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United States

Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN SURETY COMPANY, a Corpora-
tion, and E. L. McDOUGAL,

Appellants,

vs.

THE BANK OF CALIFORNIA, NATIONAL
ASSOCIATION, a Corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
For the District of Oregon

FILED

AUG 11 1942

PAUL P. O'BRIEN,
CLERK

No. 10188

United States
Circuit Court of Appeals
For the Ninth Circuit.

AMERICAN SURETY COMPANY, a Corpora-
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
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Portland, Oregon;

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American Bank Building,

Portland, Oregon;

E. L. McDOUGAL,

American Bank Building,

Portland, Oregon;

RANDALL S. JONES,

Wilcox Building,

Portland, Oregon.

For Appellee:

McCAMANT, KING & WOOD, BORDEN

WOOD, and ROBERT S. MILLER,

American Bank Building,

Portland, Oregon.

In the District Court of the United States
For the District of Oregon

November Term, 1939

Be It Remembered, that on the 11th day of January, 1940, there was duly filed in the District Court of the United States for the District of Oregon, a Complaint in words and figures as follows, to wit:

[1]*

In the District Court of the United States
For the District of Oregon

No. 10188

AMERICAN SURETY COMPANY OF NEW
YORK, a Corporation, and E. L. McDOUGAL,
Plaintiffs,

vs.

THE BANK OF CALIFORNIA, NATIONAL
ASSOCIATION, a Corporation,
Defendant.

COMPLAINT.

Plaintiffs complain and for cause of action against the defendant allege:

I.

During all of the times hereinafter mentioned, plaintiff American Surety Company of New York, was and now is a corporation organized and exist-

*Page numbering appearing at foot of page of original certified Transcript of Record.

ing under and by virtue of the laws of the State of New York, with its home office and principal place of business in the City of New York, State of New York, and it is a resident and citizen of the State of New York and now is and at all times hereinafter mentioned was engaged in the business of writing surety and other bonds.

II.

Plaintiff E. L. McDougal is a citizen and resident of the State of Oregon.

III.

During all of the times hereinafter mentioned defendant, The Bank of California, National Association, was and now is a national banking association incorporated under the laws of the United States with its home office and principal place of business in the City of San Francisco, State of California, and with a branch bank in Portland, Oregon, and is doing business in the State of Oregon. [2]

IV.

During all of the times hereinafter mentioned, Interior Warehouse Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal place of business in the City of Portland, State of Oregon.

V.

There is a diversity of citizenship and the matter in controversy exclusive of interest and costs exceeds the sum of \$3,000.00.

VI.

That between September 1, 1935, and May 2, 1939, and during all times herein mentioned, the Interior Warehouse Company, a corporation, was a depositor in the defendant's branch bank in the City of Portland, Oregon, and during all the said times maintained a deposit and checking account and had deposited with defendant bank to the credit of said account funds in excess of the amounts hereinafter set forth, and there existed a credit in its favor for the money it had deposited with the defendant.

VII.

That between said dates the defendant wrongfully charged and deducted from the deposits in the checking account of the Interior Warehouse Company, a corporation, the sum of \$6,562.33, the same being the total of 126 separate checks made payable to the order of various payees named in said checks; that defendant paid the amount specified in each of said checks, and charged the amount thereof against the deposit account of said Interior Warehouse Company, a corporation, but that in paying said amounts defendant did not follow any directions or authorization of said Interior Warehouse Company, a corporation, or pay any such amounts to any lawful holder or owner of any of said checks for the reason that in each instance the endorsement of each payee of said checks [3] was forged and in no instance did any payee of any of said checks authorize any payment to be made thereon.

VIII.

That a description of each of said checks giving the date of issue thereof, number, name of payee and amount, is as follows:

Date of Issue	Check Number	Name of Payee	Amount
Apr. 21, 1939	5117	C. Warren	\$ 41.55
Feb. 24, 1939	4653	C. Clarkson	42.00
Sept. 8, 1938	3536	C. W. Clark	46.78
Sept. 1, 1938	3461	C. W. Clark	42.57
Aug. 26, 1938	3423	C. W. Clark	47.77
Aug. 19, 1938	3383	C. W. Clark	51.97
July 22, 1938	3184	C. W. Clark	34.15
June 30, 1938	3059	C. W. Clark	42.17
June 23, 1938	3039	C. W. Clark	33.24
June 9, 1938	2978	C. W. Clark	33.86
May 27, 1938	2886	C. W. Clark	28.84
May 19, 1938	2877	C. W. Clark	28.81
May 13, 1938	2852	C. W. Clark	29.70
Apr. 21, 1938	2770	C. W. Clark	36.66
Apr. 14, 1938	2728	C. W. Clark	49.99
Mar. 25, 1938	2586	L. G. Gross	33.73
Mar. 11, 1938	2473	C. W. Clark	36.33
Feb. 17, 1938	2337	C. W. Clark	36.38
Feb. 10, 1938	2292	C. W. Clark	45.79
Jan. 20, 1938	2125	C. W. Clark	37.97
Jan. 13, 1938	2094	A. R. Reed	31.98
Dec. 23, 1937	1950	C. W. Carey	35.64
Dec. 16, 1937	1925	C. W. Carey	37.15
Dec. 10, 1937	1871	C. W. Carey	31.60
Dec. 3, 1937	1807	C. W. Carey	41.58
Nov. 18, 1937	1625	C. W. Carey	50.54
Nov. 11, 1937	1532	C. W. Carey	30.79
Nov. 4, 1937	1479	C. W. Carey	33.66
Oct. 28, 1937	1369	C. W. Carey	35.64
Oct. 21, 1937	1344	C. W. Carey	34.38
June 24, 1937	713	B. Stewart	30.94
Nov. 15, 1936	B15889	R. Mcaycal	41.66
Dec. 31, 1935	B15007	J. Moore	30.00
Jan. 27, 1939	4339	W. B. Farthing	42.75

Date of Issue	Check Number	Name of Payee	Amount
Oct. 21, 1938	3698	W. H. Hemming	\$ 30.63
July 23, 1937	811	F. Franz	15.05
July 23, 1937	792	A. Stoutenburg	40.99
July 1, 1937	723	R. P. Rawls	31.98
May 20, 1937	617	A. Stoutenburg	42.12
Apr. 22, 1937	505	W. H. Hemming	33.62
Oct. 29, 1936	B15857	J. Fenton	24.30
Oct. 22, 1936	B15816	R. McAyeal	52.95
Sept. 17, 1936	B15670	A. Wright	31.20
Sept. 10, 1936	B15620	E. Foss	24.00
Apr. 3, 1939	4996	C. C. Elledge	99.00
Jan. 6, 1939	4233	W. C. Bumgarner	128.70
Jan. 6, 1939	560	W. C. Bumgarner	40.11
Nov. 14, 1938	3895	J. A. Frischknecht	49.50
Nov. 1, 1938	3749	Roy Lamb	89.10
Oct. 15, 1938	3691	J. A. Frischknecht	49.50

[4]

Aug. 15, 1938	3373	J. A. Frischknecht	49.50
July 14, 1938	3156	J. A. Frischknecht	49.50
July 5, 1938	3126	F. A. Darnielle	50.00
June 3, 1938	2944	C. C. Elledge	74.25
May 2, 1938	2812	Roy Lamb	84.15
Feb. 15, 1938	2330	J. A. Frischknecht	49.50
Feb. 2, 1938	2259	C. C. Elledge	74.25
Jan. 15, 1938	2113	J. A. Frischknecht	49.50
Dec. 15, 1937	1909	J. A. Frischknecht	49.50
Dec. 6, 1937	1845	P. Henning	60.00
Nov. 15, 1937	1612	J. A. Frischknecht	49.50
Nov. 1, 1937	1453	C. C. Elledge	74.25
Oct. 4, 1937	1243	Roy Lamb	88.70
Sept. 30, 1937	1255	C. G. Starr	74.25
Sept. 15, 1937	1140	J. A. Frischknecht	49.50
Sept. 3, 1937	1118	C. C. Elledge	74.25
Aug. 14, 1937	942	J. A. Frischknecht	49.50
Aug. 4, 1937	860	C. G. Starr	74.25
July 15, 1937	765	J. A. Frischknecht	49.50
July 2, 1937	742	W. C. Bumgarner	123.75
June 3, 1937	657	Roy Lamb	79.20
May 4, 1937	575	Roy Lamb	49.20
May 3, 1937	549	C. C. Elledge	74.25

The Bank of California

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Date of Issue	Check Number	Name of Payee	Amount
April 1, 1937	429	Roy Lamb	\$79.20
Mar. 3, 1937	139	Roy Lamb	79.20
Feb. 2, 1937	A10753	Roy Lamb	79.20
Jan. 4, 1937	A10680	J. A. Frischknecht	50.00
Nov. 3, 1936	A10598	P. Henning	60.00
Oct. 15, 1936	A10552	J. A. Frischknecht	50.00
Oct. 3, 1936	A10547	C. C. Elledge	74.25
Sept. 15, 1936	A10479	J. A. Frischknecht	50.00
Mar. 3, 1939	4726	Dick Sperry	28.51
Mar. 3, 1939	4725	Henry Robertson	31.68
Mar. 3, 1939	4724	Ed. Thorpe	76.03
Feb. 2, 1939	4409	Ed. Thorpe	79.20
Feb. 2, 1939	4408	Dick Sperry	4.75
Jan. 4, 1939	4223	Ed. Thorpe	82.37
Oct. 3, 1938	3650	M. Fennimore	78.41
Sept. 6, 1938	3512	Fred Mutt	56.43
Sept. 6, 1938	3511	C. H. Peters	130.68
Aug. 2, 1938	3266	Kemper Snow	33.66
Aug. 2, 1938	3265	Joe Green	123.75
Aug. 2, 1938	3264	Ed. Thorpe	123.75
June 1, 1938	2920	Roy Lamb	84.15
Apr. 5, 1938	2701	J. E. Flor	50.23
Apr. 2, 1938	2687	Ed. Thorpe	90.68
Feb. 1, 1938	2240	Robt. Stilson	25.24
Jan. 3, 1938	2035	Roy Lamb	84.15
Sept. 2, 1937	1064	L. G. Speck	80.19
Aug. 3, 1937	849	M. Fennimore	59.40
Sept. 3, 1936	A10451	E. J. Ricker	70.09
Oct. 2, 1935	A9880	M. N. Mellick	20.00
Oct. 2, 1935	A9879	Ed. Mellick	20.00
Oct. 2, 1935	A9878	N. A. Campbell	28.80
Dec. 5, 1938	4016	C. C. Elledge	99.00
Dec. 2, 1938	4004	Ed. Thorpe	76.03
Dec. 2, 1938	4003	Dick Sperry	11.09
Dec. 1, 1938	3965	Roy Lamb	89.10
Nov. 2, 1938	3762	Dick Sperry	34.16
Nov. 2, 1938	3761	Kemper Snow	87.12
			[5]
Nov. 2, 1938	3760	Ed Thorpe	120.78
Aug. 31, 1938	3499	J. W. Bradley	17.82
Aug. 31, 1938	3496	John Klamert	8.91

Date of Issue	Check Number	Name of Payee	Amount
Aug. 31, 1938	3483	John Klamert	\$ 60.38
Dec. 10, 1936	B15920	W. H. Hemming	25.50
Dec. 1, 1936	A10622	Roy Lamb	80.00
Aug. 27, 1936	B15566	F. N. Alexander	43.20
Aug. 3, 1936	A10346	J. A. Frischknecht	50.00
July 9, 1936	B15367	A. Rieman	14.40
July 3, 1936	A10323	P. Henning	49.50
July 1, 1936	A10292	Roy Lamb	19.50
June 18, 1936	B15340	G. Edmonson	14.40
May 1936	A10230	(The carbon copy of the numbered check has been torn out. The payee of the preceding check (No. 10229) was P. Henning, an employee, and it has been assumed that the carbon copy of check No. 10230 originally showed the same payee)	49.50
Sept. 30, 1937	81	Frank D. Hatcher	23.86
Sept. 30, 1936	A10485	Frank Hatcher	24.91
Jan. 4, 1937	A10689	R. W. Umbarger	7.60

X.

That said Interior Warehouse Company, a corporation, had a policy of insurance with the Underwriters at Lloyd's of London, by reason of which it was entitled to and did receive from the Underwriters at Lloyd's of London, the sum of \$5,562.33 of the charges wrongfully deducted from its deposits in the checking account in defendant's bank; and also, the Interior Warehouse Company, a corporation, had a policy of insurance with the plaintiff, American Surety Company of New York, a corporation, by reason of which it was entitled to and

did receive from the American Surety Company of New York, the sum of \$1,000.00 of the charges wrongfully deducted from its deposits in the checking account of the defendant bank.

XI.

That by reason thereof defendant became indebted to said Interior Warehouse Company, a corporation, in the sum of \$6,562.33 which said sum defendant has refused to pay to said Interior Warehouse Company, a corporation, or to the plaintiffs herein, although within a reasonable time after said wrongful payments of said checks and within a reasonable time after knowledge thereof by said [6] Interior Warehouse Company said Interior Warehouse Company and plaintiffs on or about October 16, 1939, notified defendant of said wrongful payments and tendered said checks to defendant and demanded payment of the several amounts thereof.

XII.

That under the terms of said policies of insurance and in accordance with the provisions therein, the Interior Warehouse Company, a corporation, upon payment of said sums, assigned to the Underwriters at Lloyd's of London and the American Surety Company of New York, respectively, for the amount of said loss paid under their respective policies, its claim against the defendant.

XIII.

That prior to the commencement of this action the Underwriters at Lloyd's of London, to whom

the claim was assigned as above stated, assigned said claim to plaintiff, E. L. McDougal.

XIV.

That the defendant owes plaintiff, E. L. McDougal, the sum of \$5,562.33, together with interest at the legal rate from the 16th day of October, 1939, and defendant owes plaintiff, American Surety Company of New York, the sum of \$1,000.00 together with interest at the legal rate from the 16th day of October, 1939.

Wherefore, plaintiffs pray judgment against the defendant in the sum of \$5,562.33 together with the legal rate of interest thereon from the 16th day of October, 1939, and for the further sum of \$1,000.00 together with interest at the legal rate from the 16th day of October, 1939, and for their costs and disbursements incurred herein.

PLOWDEN STOTT

CAKE, JAUREGUY & TOOZE,

Address: Yeon Building, Portland, Ore.

E. L. McDOUGAL,

RANDALL S. JONES,

Attorneys for Plaintiffs. [7]

Address: American Bank Building,
Portland, Oregon

(Duly verified.)

[Endorsed]: Filed January 11, 1940. [8]

And afterwards, to wit, on the 1st day of February, 1940, there was duly filed in said Court, a Motion of defendant to Dismiss, in words and figures as follows, to wit: [9]

[Title of District Court and Cause.]

MOTION OF
DEFENDANT AND AFFIDAVIT

Comes now the defendant by its attorneys and, based upon the files and records of this court in this cause (and, as to paragraph 1 hereof, based also upon the affidavit of E. F. Munly hereto attached and by reference made a part hereof), moves the court as follows:

1. For an order dismissing this cause on the ground that the court lacks jurisdiction in that at the time of the institution of this cause Interior Warehouse Company and plaintiff E. L. McDougal, and each of them, were citizens and residents of the State of Oregon and defendant may have been, for the purposes of this cause, also a citizen and resident of the State of Oregon. Defendant suggests that the court lacks jurisdiction in that at the time of the institution of this cause Interior Warehouse Company, plaintiff E. L. McDougal and defendant, and each of them, may have been citizens and residents of the same state.

2. Without waiving the foregoing, for an order

dismissing this cause as to plaintiff American Surety Company of New York on the ground that the court lacks jurisdiction in that the amount actually in controversy between [10] said plaintiff and defendant is less than three thousand dollars, exclusive of interest and costs.

3. Without waiving any of the foregoing, for an order dismissing this cause on the ground that the complaint fails to state claims or a claim against defendant upon which relief can be granted in that

(a) Neither by subrogation nor assignment are plaintiffs or either of them entitled to maintain this cause as alleged assignees of the claims or any of the claims specified in said complaint.

(b) Plaintiffs and each of them fail to assert any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences.

4. Without waiving any of the foregoing, for an order requiring plaintiffs to state in separate counts and to separately state and number their respective statements of claims on the ground that one or more affirmative defenses might be appropriate to one claim and not to the other.

5. Without waiving any of the foregoing, for an order requiring each plaintiff to state in separate counts and to separately state and number each separate claim respectively claimed by it or him on the ground that the complaint shows that each claim

therein specified is founded upon a separate transaction or occurrence.

BORDEN WOOD,

Attorney for Defendant.

Address: 926 American Bank Building,
Portland, Oregon.

McCAMANT, THOMPSON,

KING & WOOD,

Attorneys for Defendant.

Address: 926 American Bank Building,
Portland, Oregon. [11]

State and District of Oregon,
County of Multnomah—ss.

I, E. F. Munly, being first duly sworn, depose and say that I am one of the assistant managers of the Portland, Oregon, Branch of The Bank of California, National Association, the defendant named in the cause specified in the attached and foregoing motion, and I make this affidavit for and in its behalf in support of paragraph 1 of said motion.

At the time of the institution of said cause and during all of the times in the complaint therein specified said The Bank of California, National Association, was, and continuously since then has been, a national banking association organized and existing under and by virtue of the National Banking Laws of the United States of America, with its home office and principal place of business in the City of San Francisco, State of California. Dur-

ing all of said times Article Second of the Articles of Association of said The Bank of California, National Association, provided and still provides, as follows:

“Second. The place where its banking house or office shall be located and its operations of discount and deposit carried on and its general business conducted, shall be the City and County of San Francisco, State of California, with branches at Portland, Multnomah County, Oregon; Seattle, King County, Washington; Tacoma, Pierce County, Washington, and Virginia City, Storey County, Nevada.”

During all of said times said The Bank of California, National Association, has owned and maintained, and still owns and maintains, a branch at Portland, Multnomah County, State of Oregon, which at all of said times was, and still is located in the State of Oregon and transacting business [12] in the State of Oregon as such branch.

E. F. MUNLY.

Subscribed and sworn to before me this 1st day of February, 1940.

(Seal) CHAS. G. HEPNER,

Notary Public for Oregon.

My commission expires April 12, 1941.

[Endorsed]: Filed February 1, 1940. [13]

And afterwards, to wit, on Saturday, the 13th day of April, 1940, the same being the 35th judi-

cial day of the Regular March 1940 Term of said Court; present the Honorable Claude McColloch, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

[16]

[Title of District Court and Cause.]

ORDER DEFERRING DETERMINATION OF
MOTION

The motion of defendant for an order dismissing the above cause and for other relief having been argued to the Court and briefs having been submitted, and the Court being of the opinion that further hearing and determination thereof should be deferred,

It is hereby ordered that further hearing and the determination of defendant's motion to dismiss and for other relief be, and the same is hereby, deferred until the time of pre-trial hearing or the final trial.

Dated this 13th day of April, 1940.

CLAUDE MCCOLLOCH.

[Endorsed]: Filed April 13, 1940. [17]

And afterwards, to wit, on the 3rd day of May, 1940, there was duly filed in said Court, an Answer, in words and figures as follows, to wit: [18]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant and, for good and sufficient answer to the plaintiffs' complaint on file herein, admits, alleges and denies as follows:

I.

Admits the allegations contained in paragraphs I, II, III and IV of the plaintiffs' complaint.

II.

Admits that the matter in controversy, exclusive of interests and costs, exceeds the sum of \$3000. The defendant has suggested to this honorable court, by motion on file herein, and does believe that no diversity of citizenship exists between the plaintiff E. L. McDougal and the Defendant, and therefore denies that there is a diversity of citizenship, as alleged in paragraph V of the complaint.

III.

Admits the allegations contained in paragraph VI of the complaint.

IV.

Admits that the defendant paid the amount specified in each of 126 separate checks made payable to various payees and charged the amount thereof against the deposit account of the Interior Warehouse Company, a corporation, as listed and set forth in paragraph VIII of the complaint, saving and excepting the following such checks:

Date of Issue	Check Number	Name of Payee	Amount
Dec. 5, 1938	4016	C. C. Elledge	\$ 99.00
Dec. 2, 1938	4004	Ed. Thorpe	76.03
Dec. 2, 1938	4003	Dick Sperry	11.09
Dec. 1, 1938	3965	Roy Lamb	89.10
Nov. 2, 1938	3762	Dick Sperry	34.16
Nov. 2, 1938	3761	Kemper Snow	87.12
Nov. 2, 1938	3760	Ed Thorpe	120.78
Aug. 31, 1938	3499	J. W. Bradley	17.82
Aug. 31, 1938	3496	John Klamert	8.91
Aug. 31, 1938	3483	John Klamert	60.38
Dec. 10, 1936	B15920	W. H. Hemming	25.50
Dec. 1, 1936	A10622	Roy Lamb	80.00
Aug. 27, 1936	B15566	F. N. Alexander	43.20
Aug. 3, 1936	A10346	J. A. Frischknecht	50.00
July 9, 1936	B15367	A. Rieman	14.40
July 3, 1936	A10323	P. Henning	49.50
July 1, 1936	A10292	Roy Lamb	19.50
June 18, 1936	B15340	G. Edmonson	14.40
May 1936	A10230		49.50

The defendant does not have any knowledge or information upon which to form a belief as to the truth or falsity of the remaining allegations and matters contained and listed in paragraphs VII and VIII of the complaint, and therefore denies each and every remaining allegation and matter contained therein.

V.

The defendant alleges that it has no knowledge or [20] information upon which to form a belief as to the truth or falsity of the allegations and matters contained in paragraph IX, erroneously numbered X, of the complaint, and therefore denies each and every such allegation and matter contained therein.

VI.

Defendant admits that said Interior Warehouse Company and plaintiffs on or about October 16, 1939, notified the defendant of payments alleged by them to have been wrongful and tendered said checks to defendant and demanded payment of the several amounts thereof, and that the defendant refused to pay to said Interior Warehouse Company or to the plaintiffs herein the sum of \$6,562.33.

The defendant denies each and every other allegation and matter contained in paragraph X, erroneously numbered XI, of the complaint.

VII.

Defendant has no knowledge or information upon which to form a belief as to the truth or falsity of the allegations and matters contained in paragraph XI and XII, erroneously numbered XII and XIII, of the complaint, and therefore denies each and every allegation and matter contained therein.

VIII

Defendant denies each and every allegation contained in paragraph XIII, erroneously numbered XIV, of the complaint.

First Further and Separate Answer and Defense.

Comes now the defendant and, for its first further [21] and separate answer and defense, alleges:

I.

During all of the times hereinafter mentioned, plaintiff American Surety Company of New York

was, and now is, a corporation organized and existing under and by virtue of the laws of the State of New York, with its home office and principal place of business in the City of New York, State of New York, and it is a resident and citizen of the State of New York, and now is, and at all times hereinafter mentioned was, engaged in the business of writing surety and other bonds.

II.

Plaintiff E. L. McDougal is a citizen and resident of the State of Oregon.

III.

During all of the times hereinafter mentioned, The Bank of California, National Association, was, and now is, a national banking association incorporated under the laws of the United States, with its home office and principal place of business in the City of San Francisco, State of California, and with a branch bank in Portland, Oregon, and is, and during all of the times hereinafter mentioned has been, duly qualified to do and doing business in the State of Oregon.

IV.

During all of the times hereinafter mentioned, Interior Warehouse Company was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal place of business in the City of Portland, State of Oregon. [22]

V.

Between September 1, 1935, and May 2, 1939, the said Interior Warehouse Company deposited funds in the defendant bank at its branch in the City of Portland, Oregon, from which deposit the defendant paid out the funds of the said Interior Warehouse Company upon checks duly presented to the defendant in the regular course of business when and as directed by said Interior Warehouse Company and upon its order.

VI.

The defendant rendered to the said Interior Warehouse Company on or about the first of every month during all of the times herein mentioned a bank statement of the account of said Interior Warehouse Company in the defendant bank, together with all of the canceled checks of the said Interior Warehouse Company drawn against its deposit with the defendant. A reasonably careful examination of said statements and canceled checks would have disclosed irregularities and discrepancies, if any existed, in the preparation and issuance of pay checks drawn by said Interior Warehouse Company.

VII.

Said Interior Warehouse Company had notice of discrepancies and irregularities in the preparation and issuance of said checks drawn on the defendant if, as a matter of fact, such discrepancies and irregularities existed.

VIII.

If any payments were made by the defendant from the funds of said Interior Warehouse Company upon checks drawn by said Interior Warehouse Company and bearing a forged endorsement of the payee thereon, then such payments by the [23] defendant were the direct and proximate result of the negligence of said Interior Warehouse Company in this, that it failed and refused to adopt and maintain in operation in its business a system of bookkeeping and accounting reasonably necessary to safeguard itself and the defendant from the fraudulent acts of the agents and employees of the said Interior Warehouse Company; it failed and refused to make a careful investigation into the condition of its books, records and statements and the conduct of its employees, and failed and refused to notify the defendant within a reasonable time after it had notice or should have known of the fraudulent acts, if any, of its agents and employees in forging the payees' endorsements upon checks drawn by the Interior Warehouse Company upon the defendant, if any such endorsements were so forged.

Second Further and Separate Answer and Defense
Pro Tanto.

Comes now the defendant and, for its second further and separate answer and defense pro tanto, alleges:

I, II, III and IV

Paragraphs I, II, III and IV of the defendant's first further and separate answers and defense are

here referred to and by reference thereto incorporated herein as fully as if set out in haec verba.

V.

If the Interior Warehouse Company, a corporation, drew checks payable to fictitious and nonexistent persons who neither were, nor at any time had been, in the employ [24] of said Interior Warehouse Company, said checks to be paid by the defendant out of funds deposited for that purpose by said Interior Warehouse Company, then by drawing such checks said Interior Warehouse Company did represent to the defendant that the named payees were existent persons in the employ of said Interior Warehouse Company, which representation was false and misleading. Said Interior Warehouse Company knew, or by reasonable care could have known, that said representations were false and misleading. Said Interior Warehouse Company intended that the defendant rely upon its said representation. Defendant did not know that the payees named in the checks were nonexistent and fictitious and could not have ascertained that said representation was false and misleading. Said representation was relied upon by the defendant, whereby the defendant's risk in making payment upon such checks was greatly increased.

VI.

If the defendant made payments upon such checks to persons not intended by the said Interior Warehouse Company to endorse the payees' signatures

thereon and receive payment thereof, the defendant would suffer a loss in the amount of said payment. Said Interior Warehouse Company is therefore estopped to allege that the defendant did not make payment on said checks to the persons entitled thereto in conformity with the order of said Interior Warehouse Company.

THIRD FURTHER AND SEPARATE
ANSWER AND DEFENSE PRO TANTO.

Comes now the defendant, and for its third further [25] and separate answer and defense pro tanto, alleges:

I, II, III and IV

Paragraphs I, II, III and IV of the defendant's first further and separate answer and defense are here referred to and by reference thereto incorporated herein as fully as if set out in haec verba.

V.

The plaintiffs in the above entitled cause commenced the instant action on the 11th day of January, 1940, in which they seek to recover from the defendant certain funds alleged to have been wrongfully and tortiously converted from the deposit maintained with the defendant by said Interior Warehouse Company.

VI.

The following checks, if any or all of them existed and were drawn on the defendant by said Interior

Warehouse Company, upon the payment of which out of funds of the said Interior Warehouse Company the plaintiffs base their claim, were paid by the defendant and charged to the account of the said Interior Warehouse Company more than two years prior to the commencement of this action:

Date of Issue	Check Number	Name of Payee	Amount
Dec. 23, 1937	1950	C. W. Carey	\$ 35.64
Dec. 16, 1937	1925	C. W. Carey	37.15
Dec. 10, 1937	1871	C. W. Carey	31.60
Dec. 3, 1937	1807	C. W. Carey	41.58
Nov. 18, 1937	1625	C. W. Carey	50.54
Nov. 11, 1937	1532	C. W. Carey	30.79
Nov. 4, 1937	1479	C. W. Carey	33.66
Oct. 28, 1937	1369	C. W. Carey	35.64
Oct. 21, 1937	1344	C. W. Carey	34.38
June 24, 1937	713	B. Stewart	30.94
Nov. 15, 1936	B15889	R. Mcayéal	41.66
Dec. 31, 1935	B15007	J. Moore	30.00
July 23, 1937	811	F. Franz	15.05
July 23, 1937	792	A. Stoutenburg	40.99
July 1, 1937	723	R. P. Rawls	31.98
May 20, 1937	617	A. Stoutenburg	42.12
[26]			
Apr. 22, 1937	505	W. H. Hemming	33.62
Oct. 29, 1936	B15857	J. Fenton	24.30
Oct. 22, 1936	B15816	R. McAyeal	52.95
Sept. 17, 1936	B15670	A. Wright	31.20
Sept. 10, 1936	B15620	E. Foss	24.00
Dec. 15, 1937	1909	J. A. Frischknecht	49.50
Dec. 6, 1937	1845	P. Henning	60.00
Nov. 15, 1937	1612	J. A. Frischknecht	49.50
Nov. 1, 1937	1453	C. C. Elledge	74.25
Oct. 4, 1937	1243	Roy Lamb	88.70
Sept. 30, 1937	1255	C. G. Starr	74.25
Sept. 15, 1937	1140	J. A. Frischknecht	49.50
Sept. 3, 1937	1118	C. C. Elledge	74.25
Aug. 14, 1937	942	J. A. Frischknecht	49.50

Date of Issue	Check Number	Name of Payee	Amount
Aug. 4, 1937	860	C. G. Starr	74.25
July 15, 1937	765	J. A. Frischknecht	49.50
July 2, 1937	742	W. C. Bumgarner	123.75
June 3, 1937	657	Roy Lamb	79.20
May 4, 1937	575	Roy Lamb	49.20
May 3, 1937	549	C. C. Elledge	74.25
April 1, 1937	429	Roy Lamb	79.20
Mar. 3, 1937	139	Roy Lamb	79.20
Feb. 2, 1937	A10753	Roy Lamb	79.20
May 4, 1937	575	J. A. Frischknecht	50.00
Nov. 3, 1936	A10598	P. Henning	60.00
Oct. 15, 1936	A10552	J. A. Frischknecht	50.00
Oct. 3, 1936	A10547	C. C. Elledge	74.25
Sept. 15, 1936	A10479	J. A. Frischknecht	50.00
Jan. 3, 1938	2035	Roy Lamb	84.15
Sept. 2, 1937	1064	L. G. Speck	80.19
Aug. 3, 1937	849	M. Fennimore	59.40
Sept. 3, 1936	A10451	E. J. Ricker	70.09
Oct. 2, 1935	A9880	M. N. Mellick	20.00
Oct. 2, 1935	A9879	Ed Mellick	20.00
Oct. 2, 1935	A9878	N. A. Campbell	28.80
Dec. 10, 1936	B15920	W. H. Hemming	25.50
Dec. 1, 1936	A10622	Roy Lamb	80.00
Aug. 27, 1936	B15566	F. N. Alexander	43.20
Aug. 3, 1936	A10346	J. A. Frischknecht	50.00
July 9, 1936	B15367	A. Rieman	14.40
July 3, 1936	A10323	P. Henning	49.50
July 1, 1936	A10292	Roy Lamb	19.50
June 18, 1936	B15340	G. Edmonson	14.40
May 1936	A10230	—	49.50
Sept. 30, 1937	81	Frank D. Hatcher	23.86
Sept. 30, 1936	A10485	Frank Hatcher	24.91
Jan. 4, 1937	A10689	R. W. Umbarger	7.60

Wherefore, the defendants having fully answered the plaintiffs' complaint herein pray that the plaintiffs take nothing hereby and that the same be dismissed, and that the defendant recover of and from

the plaintiffs its costs and [27] disbursements herein incurred.

McCAMANT, THOMPSON,
KING & WOOD,
BORDEN WOOD,

Attorneys for Defendant.

Address: 926 American Bank Building,
Portland, Oregon.

[Endorsed]: Filed May 3, 1940. [28]

And afterwards, to wit, on Wednesday, the 26th day of March, 1941, the same being the 21st Judicial day of the Regular March 1941 Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [29]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This matter coming on for pre-trial conference before the Honorable James Alger Fee, judge of the above entitled court, at 3:45 p.m., on the 9th day of October, 1940, the plaintiffs appearing by Messrs. Plowden Stott, Nicholas Jaureguy and Randall S. Jones, and the defendant appearing by E. F. Munly, one of its assistant managers, and Mr. Borden Wood, its attorney, whereupon the following proceedings were had:

I.

The following pre-trial exhibits were introduced by plaintiff:

#1. One hundred seven (107) original canceled checks drawn on defendant, dated from October 2, 1935 to April 21, 1939, and which may be admitted without further identification.

#1A. Photostatic copies of a portion of said checks, subject to defendant's right to check the same against the originals, which photostatic copies may be admitted in lieu of the originals.

#1B. Photostatic copies of the remainder of said checks, subject to defendant's right to check the same against the originals, which photostatic copies may be admitted in lieu of the originals. [30]

#2. Carbon copies of nineteen (19) checks, subject to the objection that they are not the best evidence, are incompetent, irrelevant, and immaterial and that if defendant should purchase these checks it would be entitled to delivery and possession of the originals. Defendant refused to admit authentication or identification of these copies.

#3. Audit by Price, Waterhouse & Company, admitted by defendant to be the original of such audit without further identification, subject, however, to any and all legal objections to any statement, matter or thing therein contained where the same is or are not supported at the trial by bank statements, original

documents or legally admissible testimony to be produced or supplied by plaintiffs.

#4. Written memorandum bearing date 5-23-39, signed "G. L. Crowe", subject to defendant's objection on the ground of incompetency, irrelevancy and immateriality. Defendant refused to admit that the signature thereon was that of G. L. Crowe.

#5. Statement dated May 3, 1939, signed "G. L. Crowe," subject to defendant's objection on the ground of incompetency, irrelevancy and immateriality. Defendant refused to admit that the signature thereon was that of G. L. Crowe.

#6. Tabulation headed "Interior Warehouse Company, checks discovered by P. W. & Co. and listed by Mr. G. L. Crowe as being improper payments," dated 5-2-39, subject to defendant's objection on the ground of incompetency, irrelevancy and immateriality. Defendant refused to admit that the initialing or signature thereon was that of G. L. Crowe.

#7. Policy, American Surety Company of New York, dated July 1, 1931 (with leave to substitute a photostatic copy), admitted by defendant to be the original without further identification, subject to defendant's objection on the ground of immateriality and incompetency.

#8. Lloyd's policy N-36882, admitted by defendant to be the original without further identification, subject to defendant's objection on

the ground of immateriality and incompetency.

#9. Photostatic copy of Lloyd's policy N-44987, defendant admitting authenticity but reserving the right to object on the ground of immateriality and incompetency.

#10. Claim of Balfour, Guthrie & Co., Ltd., on American Surety Company of New York dated May 31, 1939, defendant admitting authenticity but reserving the right to object on the ground of immateriality, irrelevancy and incompetency. [31]

#11. Carbon copy of claim of Balfour, Guthrie & Co., Ltd. on Lloyd's of London dated May 31, 1939, defendant admitting authenticity and waiving objection that the original was not produced, but reserving the right to object on the ground of irrelevancy, incompetency and immateriality.

#12. Check dated Aug. 3, 1939, No. U-6124, Durham & Bates to Balfour, Guthrie & Co., Ltd., admittedly issued by the insurers under Exhibits 8 and 9, defendant admitting authenticity but reserving the right to object on the ground of irrelevancy, incompetency and immateriality.

#13. Check dated Aug. 4, 1939, No. U-6126, Durham & Bates to Balfour, Guthrie & Co., Ltd., admittedly issued by the insurers under Exhibits 8 and 9, defendant admitting authenticity but reserving the right to object on the ground of irrelevancy, incompetency and immateriality.

#13A. Check dated June 7, 1939, #21175, American Surety Company of New York to Balfour, Guthrie & Co., Ltd. defendant admitting authenticity but reserving the right to object on the ground of irrelevancy, incompetency and immateriality.

#14. Assignment, Lloyd's of London to E. L. McDougal, executed Oct. 25, 1939, defendant admitting authenticity but reserving the right to object on the ground of irrelevancy, incompetency and immateriality.

#15. Copy of page 32, Cash Receipts, August, 1939, defendant admitting authenticity and waiving objection that the original was not produced but reserving the right to object on the ground of immateriality, incompetency and irrelevancy.

#16. Copy of page 33, Cash Receipts, Aug. 5, 1939, defendant admitting authenticity and waiving objection that the original was not produced but reserving the right to object on the ground of irrelevancy, incompetency and immateriality.

#17. Copy of tabulation headed "Balfour, Guthrie & Co., Ltd., Portland, Oregon, Cash Received," dated June 8, 1939, defendant admitting authenticity and waiving objection that the original was not produced, but reserving the right to object on the ground of irrelevancy, incompetency and immateriality.

#18. Printed document bearing heading

“The Bank of California National Association, San Francisco, Statement of Condition, including its branches in San Francisco, Portland, Seattle, Tacoma, as of October 2, 1939” (excluding the financial statement thereon, which is inadmissible), defendant admitting authenticity but reserving the right to object on the ground of irrelevancy, incompetency and immateriality. [32]

II.

The following pre-trial exhibits were introduced by defendant, subject to plaintiffs’ right to object to any of them on the ground of incompetency, irrelevancy and immateriality (the reporter is directed to mark the same, respectively, as follows):

The following books, records and documents of Interior Warehouse Company and/or Balfour, Guthrie & Co., Ltd.:

- #19. Ledger.
- #20. Journal.
- #21. Country pay roll sheets.
- #22. Dock pay roll sheets (three separate sets).
- #23. Dock time books (four books).
- #24. Bank statements and cancelled pay checks covering period of time from January, 1935, to June, 1939.
- #25. Dock pay roll sheets, January, 1935, to February, 1936.
- #26. Duplicate pay roll checks covering period of time from February 15, 1937, to December 31, 1938.

- #27. Expense reports made out by country agents.
- #28. Carbon copies of checks: two separate groups, one for dock employees, one for country employees, covers period of time from January 1, 1935, to December 1, 1937.
- #29. Duplicate checks from January, 1939, to June 30, 1939.
- #30. Pay roll and expense summaries. Covers period of time from January, 1935, to June, 1939.
- #31. Original drafts which have been cancelled; drawn by country agents, covering period of time from January, 1935, to June, 1939.
- #32. Duplicate expense checks.
- #33. Expense statements and vouchers.
- #34. Duplicate pay roll records of the country pay roll.
- #35. Bank of California deposit book issued to Interior Warehouse Co. [33]

III.

Plaintiffs and defendant agreed that, so far as they may be material at the trial, the allegations in the affidavit of E. F. Munly sworn to Feb. 1, 1940, and the affidavit of Randall S. Jones sworn to Feb. 26, 1940, both filed in connection with defendant's motion on file herein, are admitted to be true.

IV.

Defendant's motion on file herein has not been allowed or overruled, either in whole or in part.

The court is to later determine how and what time the motion is to be disposed of.

V.

(a) Defendant admitted the allegations of paragraph I of the complaint, which alleges as follows:

“During all of the times hereinafter mentioned, plaintiff American Surety Company of New York, was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, with its home office and principal place of business in the City of New York, State of New York, and it is a resident and citizen of the State of New York and now is and at all times hereinafter mentioned was engaged in the business of writing surety and other bonds.”

(b) Defendant admitted the allegations of Paragraph II of the complaint, which alleges as follows:

“Plaintiff, E. L. McDougal is a citizen and resident of the State of Oregon.”

(c) Defendant admitted the allegations of Paragraph III of the complaint, which alleges as follows:

“During all of the times hereinafter mentioned defendant, The Bank of California, National Association, was and now is a national banking association incorporated under the laws of the United States with its home office and principal place of business in the City of San Francisco, state of California, and with

a branch bank in Portland, Oregon, and is doing business in the State of Oregon.” [34]

(d) Defendant admitted the allegations of paragraph IV of the complaint, which alleges as follows:

“During all of the times hereinafter mentioned, Interior Warehouse Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Oregon, with its principal place of business in the City of Portland, State of Oregon.”

(e) Defendant admitted that the matter in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.

(f) Defendant admitted the allegations of paragraph VI of the complaint, which alleges as follows:

“That between September 1, 1935, and May 2, 1939, and during all times herein mentioned, the Interior Warehouse Company, a corporation, was a depositor in the defendant’s branch bank in the City of Portland, Oregon, and during all the said times maintained a deposit and checking account and had deposited with defendant bank to the credit of said account funds in excess of the amounts hereinafter set forth, and there existed a credit in its favor for the money it had deposited with the defendant.”

(g) As to paragraphs VII and VIII, defendant paid the amount specified in each of one hundred

twenty-six (126) separate checks made payable to various payees and charged the amount thereof against the deposit account of the Interior Warehouse Company, a corporation, as listed and set forth in said Paragraph VIII, saving and excepting the following such checks:

Date of Issue	Check Number	Name of Payee	Amount
Dec. 5, 1938	4016	C. C. Elledge	\$ 99.00
Dec. 2, 1938	4004	Ed. Thorpe	76.03
Dec. 2, 1938	4003	Dick Sperry	11.09
Dec. 1, 1938	3965	Roy Lamb	89.10
Nov. 2, 1938	3762	Dick Sperry	34.16
Nov. 2, 1938	3761	Kemper Snow	87.12
Nov. 2, 1938	3760	Ed Thorpe	120.78
Aug. 31, 1938	3499	J. W. Bradley	17.82
Aug. 31, 1938	3496	John Klamart	8.91
Aug. 31, 1938	3483	John Klamart	60.38
Dec. 10, 1936	B15920	W. H. Hemming	25.50
Dec. 1, 1936	A10622	Roy Lamb	80.00
Aug. 27, 1936	B15566	F. N. Alexander	43.20
Aug. 3, 1936	A10346	J. A. Frischknecht	50.00
July 9, 1936	B15367	A. Rieman	14.40
July 3, 1936	A10323	P. Henning	49.50
July 1, 1936	A10292	Roy Lamb	19.50
June 18, 1936	B15340	G. Edmonson	14.40
May 1936	A10230	—	49.50

[35]

(h) As to paragraph X (erroneously numbered XI) of plaintiffs' complaint, defendant admitted:

That said Interior Warehouse Company and plaintiffs on or about October 16, 1939, notified the defendant of payments alleged by them to have been wrongful and tendered said checks to defendant, saving and excepting the nineteen (19) checks specifically described in subparagraph (g) supra, and demanded payment of

the several amounts of all of said checks, including said nineteen (19) checks, and that defendant refused to pay to said Interior Warehouse Company or to the plaintiffs herein the sum of \$6,562.33. [36]

(i) Defendant denied each and every remaining allegation contained in the complaint, thus making the issues hereafter specified.

(j) Defendant admitted that Interior Warehouse Company is a subsidiary of Balfour, Guthrie & Co., Ltd., and wholly owned by the latter.

(k) Defendant agreed that proofs of loss by and payments to Balfour, Guthrie & Co., Ltd., should be considered as proofs by and payments to Interior Warehouse Company.

VI.

(a) Plaintiffs did not admit any of the allegations of the first, second or third further and separate answers and defenses contained in defendant's answer, thus making the issues hereafter specified.

(b) Plaintiffs objected to a jury trial in this case, contending that their case is based on subrogation, defendant contending that it is based on assignments.

VII.

The following issues remain for determination at or prior to trial:

1. Whether or not this court has jurisdiction of this cause:

(a) Whether diversity of citizenship exists between plaintiff E. L. McDougal and defen-

dant, and existed at the commencement of this action.

(b) Whether the court lacks jurisdiction of an alleged claim of American Surety Company, defendant asserting that said claim is separable and less than \$3000. in amount.

2. Whether defendant's motion to dismiss, on the ground that the complaint fails to state claims or a claim against defendant upon which relief can be granted, should be allowed or disallowed.

3. Whether or not there are any legal issues in this case [37] which should be submitted to a jury.

4. Whether between the dates of September 1, 1935, and May 2, 1939, defendant wrongfully charged and deducted from the deposits in the checking account of Interior Warehouse Company the sum of \$6,562.33; whether defendant paid checks aggregating that amount and specified in the complaint and charged the same against the said checking account.

5. Whether in paying said amounts defendant followed or did not follow any directions or authorization of the Interior Warehouse Company.

6. Whether defendant paid any such amounts to any lawful holder or owner of any of said checks.

7. Whether the endorsement of each payee of said checks was forged, and whether said payees, or any of them, authorized payment to be made on their respective checks.

8. Whether Interior Warehouse Company had a policy of insurance with the Underwriters at

Lloyd's of London by which it was entitled to and did receive from the latter the sum of \$5,562.33 of said \$6,562.33.

9. Whether Interior Warehouse Company had a policy of insurance with American Surety Company of New York by which it was entitled to and did receive from the latter the sum of \$1,000 of said \$6,562.33.

10. Whether defendant became indebted to Interior Warehouse Company in said sum of \$6,562.33.

11. Whether within a reasonable time after payment of said checks, or any of them, or within a reasonable time of knowledge thereof by Interior Warehouse Company, the latter and plaintiffs on or about May 16, 1939, notified defendant making claim that payment on the said checks was wrongful.

12. If said notification or notifications, if any, were not given within a reasonable time, whether the defendant was prejudiced or injured thereby, and if so to what extent. [38]

13. Whether under (a) the provisions of the policies of insurance referred to herein, (b) any rules of law or equity, or (c) any separate assignments, the Interior Warehouse Company assigned to the Underwriters of Lloyds of London (and by them assigneed to the plaintiff, E. L. McDougal) and the American Surety Company of New York, respectively, the rights of the Interior Warehouse Company to recover from the defendant the amount of the alleged loss paid under the respective policies and which amounts are now claimed against

the defendant, or under and by virtue of which policies, rules of law, or equity or assignments, the said Underwriters of Lloyds of London (and through them the said E. L. McDougal) and the American Surety Company of New York, respectively, became subrogated to such rights of the Interior Warehouse Company; the defendant claiming that the complaint herein is based upon assignments only, and the plaintiffs claiming the allegations of the complaint broad enough to cover alleged rights of subrogation.

14. Whether prior to the commencement of this action the Underwriters at Lloyd's of London assigned its said claim to plaintiff, E. L. McDougal.

15. Whether defendant owes plaintiff, E. L. McDougal, the sum of \$5,562.33, or any other sum, with interest at the legal rate from October 16, 1939, or any other date, on account of the matters and things herein and in the complaint specified.

16. Whether defendant owes plaintiff, American Surety Company of New York, the sum of \$1,000, or any other sum, with interest thereon at the legal rate from October 16, 1939, or any other date, on account of the matters and things herein and in the complaint specified.

17. Whether between September 1, 1935, and May 2, 1939, defendant paid said checks out of the account of the Interior Warehouse Company upon due presentation of said checks to defendant in the regular course of business when and as directed by Interior [39] Warehouse Company and upon its order.

18. Whether defendant rendered to Interior Warehouse Company on or about the first of every month during the times above mentioned a bank statement of the latters account with the defendant, together with all the canceled checks of the Interior Warehouse Company drawn against its deposit with defendant.

19. Whether or not a reasonably careful examination of said statements and canceled checks would have disclosed irregularities and discrepancies, if any existed, in the preparation and issuance of Interior Warehouse Company checks.

20. Whether Interior Warehouse Company had notice of any such alleged irregularities and discrepancies at the time of the preparation and issuance of its checks, or at the time of the cashing of the same by defendant.

21. Whether any of said checks bore the forged endorsement of the payee thereon, and if so, (a) whether the Interior Warehouse Company was negligent in failing and refusing to adopt and maintain in operation in its business a system of bookkeeping and accounting reasonably necessary to safeguard itself and defendant from fraudulent acts of agents and employees of Interior Warehouse Company, and in failing and refusing to make a careful investigation into the condition of its books, records and statements, and the conduct of its employees, (b) whether such negligence, if any, was the proximate cause of the defendant paying any such checks bearing forged endorsements, and (c) whether the Interior Warehouse Company negligently failed and

refused to notify defendant within a reasonable time after it knew or should have known of the fraudulent acts, if any, or its agents and employees in forging the payees' endorsements upon checks drawn by Interior Warehouse Company upon defendant, if any of said endorsements were so forged, and (d) whether such negligence, if any, was the proximate cause of the defendant paying any such checks bearing forged endorsements. [40]

22. Whether Interior Warehouse Company drew checks on its account with defendant payable to fictitious and non-existent persons known to Interior Warehouse Company to be fictitious and non-existent and who neither were nor at any time had been in its employ, and in doing so represented to defendant that the named payees were existent persons in the employ of Interior Warehouse Company, and whether such representations, if any, were false and misleading, and that Interior Warehouse Company knew or by reasonable care should have known that they were false and misleading, and that it intended that defendant rely upon such representations, if any, and whether defendant did or did not know that the payees named in the checks were non-existent and fictitious, if they were, and whether defendant could have ascertained that the representations were false and misleading, if they were, and whether such representations, if any, were relied upon by defendant, and whether such reliance increased defendant's risk in making payment upon such checks.

23. Whether Interior Warehouse Company and

plaintiffs are estopped to allege or claim that defendant did not make payment on said checks or any of them, to the persons entitled thereto in conformity with the order of Interior Warehouse Company.

Excepting, however, the plaintiffs do not regard the issues stated in paragraphs 11, 12, 18, 19, and 20 and 21 of Article VII as material in this case, and plaintiffs take the position that paragraph 4 of said article should end with the figures “\$6562.33” in line 31 on page 7 of this order, and that the substance of paragraphs 5, 6, 7, 10 and 17, are all embraced in paragraph 4 and should not be otherwise separately stated; that the substance of paragraphs 14, 15, and 16 are all embraced in paragraph 13 and should not be otherwise separately stated; that points (c) and (d) of paragraph 21 are embraced in paragraph 12 and should not be [41] separately stated, and that paragraph 22 should end with the word “non-existent” in line 3 on page 11.

Dated this 26th day of March, 1941.

JAMES ALGER FEE.

Approved:

RANDALL S. JONES,

PLOWDEN STOTT,

CAKE, JAUREGUY & TOOZE,

Attorneys for Plaintiffs.

McCAMANT, KING & WOOD,

BORDEN WOOD,

Attorneys for Defendant.

[Endorsed]: Filed March 26, 1941. [42]

And afterwards, to wit, on Tuesday, the 20th day of January, 1942, the same being the 67th Judicial day of the Regular November 1941 Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

[43]

[Title of District Court and Cause.]

ORDER OVERRULING MOTION

This matter coming on to be heard on defendant's motion for dismissal of the above-entitled and numbered cause and for other relief, plaintiff E. L. McDougal appearing in person and by his attorneys Randall S. Jones, Nicholas Jaureguy, Plowden Stott and Maurice D. Sussman, plaintiff American Surety Company of New York appearing by the same attorneys, and defendant appearing by Borden Wood and Robert S. Miller, of its attorneys, and the court having heard the arguments and considered the briefs of respective counsel for and against said motion and deeming itself advised in the premises, it is hereby

Considered, ordered and adjudged that the said motion be, and the same hereby is, in all respects overruled.

Dated: January 20th, 1942.

JAMES ALGER FEE,
Judge.

[Endorsed]: Filed January 20, 1942. [44]

And afterwards, to wit, on the 20th day of January, 1942, there was duly filed in said Court, Findings of Fact and Conclusions of Law, in words and figures as follows, to wit: [45]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled and numbered cause came on for trial before the court sitting without the intervention of a jury on March 25, 1941, and continued through March 26, 1941, and March 27, 1941, plaintiff E. L. McDougal appearing in person and by his attorneys Randall S. Jones, Nicholas Jaureguy, Plowden Stott and Maurice D. Sussman, plaintiff American Surety Company of New York appearing by the same attorneys and defendant appearing by Borden Wood and Robert S. Miller, of its attorneys, the court having heard the arguments and considered the briefs of respective counsel for and against defendant's motion for dismissal of said cause and for other relief, each party hereto introduced his and its evidence and rested, and the court having considered the briefs of respective counsel and deeming itself advised in the premises, makes the following

FINDINGS OF FACT

I.

On and prior to September 1, 1935, and continuously since that time, plaintiff E. L. McDougal was and is a citizen and resident of the State of

Oregon; plaintiff American Surety [46] Company of New York was and is a corporation organized and existing under and by virtue of the laws of the State of New York and a citizen and resident of the State of New York; Interior Warehouse Company was and is a corporation organized and existing under and by virtue of the laws of the State of Oregon and a citizen and resident of the State of Oregon; and defendant was and is a national banking association incorporated under the laws of the United States of America with its home office and principal place of business in the State of California, with a branch bank in the State of Oregon which is, and during all of said times was, doing business in the City of Portland, State of Oregon.

II

There is, and during all of said times, including the institution of this cause, was, a diversity of citizenship between the plaintiffs and the defendant.

III

The matter in controversy herein, exclusive of interest and costs, exceeds the sum or value of \$3,000.00.

IV

Between October 2, 1935, and May 1, 1939, said Interior Warehouse Company was a depositor in defendant's branch bank in Portland, Oregon, and during all of said times maintained a deposit and checking account and had deposited with defendant to the credit of said account funds in excess of the amounts hereinafter set forth.

V

Between said dates defendant cashed an aggregate

of one hundred seven (107) checks drawn on said account by said Interior Warehouse Company which checks respectively bore [47] the following respective numbers, dates, amounts and prior endorsements:

Number	Date	Amount	Endorsements
A9878	Oct. 2, 1935	\$28.80	N. A. Campbell DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
A9879	Oct. 2, 1935	20.00	Ed Mellick Hallock Meier & Frank Co. First National Bank, Portland, Oregon
A9880	Oct. 2, 1935	20.00	M. N. Mellick (initial) Lipman, Wolfe & Co., Inc. First National Bank, Portland, Oregon
B15007	Dec. 31, 1935	30.00	J. Moore DeMent Meier & Frank Co. First National Bank, Portland, Oregon
A10451	Sep. 3, 1936	70.09	E. J. Ricker J. M. Criler Lipman, Wolfe & Co., Inc. First National Bank, Portland, Oregon
B15620	Sep. 10, 1936	24.00	E. Foss (initial) Lipman, Wolfe & Co., Inc. First National Bank, Portland, Oregon
A10479	Sep. 15, 1936	50.00	J. A. Frischknecht DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon

Number	Date	Amount	Endorsements
B15670	Sep. 17, 1936	\$31.20	A. Wright (initial) Lipman, Wolfe & Co., Inc. First National Bank, Portland, Oregon
A10485	Sep. 30, 1936	24.91	Frank Hatcher (initial) Lipman, Wolfe & Co., Inc. First National Bank, Portland, Oregon
A10547	Oct. 3, 1936	74.25	C. C. Elledge DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
[48]			
A10552	Oct. 15, 1936	50.00	J. A. Frischknecht (initial) Lipman, Wolfe & Co., Inc. First National Bank, Portland, Oregon
B15816	Oct. 22, 1936	52.95	R. McAyeal (initial) Lipman, Wolfe & Co., Inc. First National Bank, Portland, Oregon
B15857	Oct. 29, 1936	24.30	J. Fenton DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
A10598	Nov. 3, 1936	60.00	P. Henning DeMent Meier & Frank Co.
B15889	Nov. 15, 1936	41.66	R. McAyeal DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon

Number	Date	Amount	Endorsements
A10689	Jan. 4, 1937	\$ 7.60	R. W. Umbarger Hallock Meier & Frank Co. The United States National Bank, Portland, Oregon
A10680	Jan. 4, 1937	50.00	J. A. Frischknecht Marber Meier & Frank Co. First National Bank, Portland, Oregon
A10753	Feb. 2, 1937	79.20	Roy Lamb DeMent Meier & Frank Co.
139	Mar. 3, 1937	79.20	Roy Lamb Hallock Meier & Frank Co.
429	Apr. 1, 1937	79.20	Roy Lamb DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
505	Apr. 22, 1937	33.62	W. H. Hemming Hallock Meier & Frank Co. First National Bank, Portland, Oregon
549	May 3, 1937	74.25	C. C. Elledge Hallock Meier & Frank Co. First National Bank, Portland, Oregon
575	May 4, 1937	49.20	Roy Lamb DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
617	May 20, 1937	42.12	A. Stoutenburg DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon

Number	Date	Amount	Endorsements
657	June 3, 1937	\$79.20	Roy Lamb Hallock Meier & Frank Co. First National Bank, Portland, Oregon
713	June 24, 1937	30.94	B. Stewart Mayes Meier & Frank Co. First National Bank, Portland, Oregon
723	July 1, 1937	31.98	R. P. Rawls (initial) Lipman, Wolfe & Co., Inc. First National Bank, Portland, Oregon
742	July 2, 1937	123.75	W. C. Bumgarner (initial) Meier & Frank Co. First National Bank, Portland, Oregon
765	July 15, 1937	49.50	J. A. Frischknecht Hallock Meier & Frank Co. First National Bank, Portland, Oregon
792	July 23, 1937	40.99	A. Stoutenburg G. L. Crowe H. J. Guindon
811	July 23, 1937	15.05	F. Franz Hallock Meier & Frank Co. First National Bank, Portland, Oregon
[50]			
849	Aug. 3, 1937	59.40	M. Fennimore (initial) Meier & Frank Co. The United States National Bank, Portland, Oregon

Number	Date	Amount	Endorsements
860	Aug. 4, 1937	\$74.25	C. G. Starr Hallock Meier & Frank Co. The United States National Bank, Portland, Oregon
942	Aug. 14, 1937	49.50	J. A. Frischknecht DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
1064	Sep. 2, 1937	80.19	L. G. Speck DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
1118	Sep. 3, 1937	74.25	C. C. Elledge DeMent Meier & Frank Co. First National Bank, Portland, Oregon
1140	Sep. 15, 1937	49.50	J. A. Frischknecht (initial) Meier & Frank Co.
1255	Sep. 30, 1937	74.25	C. G. Starr DeMent Meier & Frank Co. First National Bank, Portland, Oregon
81	Sep. 30, 1937	23.86	Frank D. Hatcher G. L. Crowe
1243	Oct. 4, 1937	88.70	Roy Lamb DeMent Meier & Frank Co. First National Bank, Portland, Oregon
1344	Oct. 21, 1937	34.38	C. W. Carey DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon

Number	Date	Amount	Endorsements
1369	Oct. 28, 1937	\$35.64	C. W. Carey DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
			[51]
1453	Nov. 1, 1937	74.25	C. C. Elledge DeMent Meier & Frank Co. First National Bank, Portland, Oregon
1479	Nov. 4, 1937	33.66	C. W. Carey DeMent Meier & Frank Co. First National Bank, Portland, Oregon
1532	Nov. 11, 1937	30.79	C. W. Carey DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
1612	Nov. 15, 1937	49.50	J. A. Frischknecht DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
1625	Nov. 18, 1937	50.54	C. W. Carey DeMent Meier & Frank Co. First National Bank, Portland, Oregon
1807	Dec. 3, 1937	41.58	C. W. Carey Kuhn Meier & Frank Co. First National Bank, Portland, Oregon
1845	Dec. 6, 1937	60.00	P. Henning Kuhn Meier & Frank Co. First National Bank, Portland, Oregon

Number	Date	Amount	Endorsements
1871	Dec. 10, 1937	\$31.60	C. W. Carey Kuhn Meier & Frank Co. First National Bank, Portland, Oregon
1909	Dec. 15, 1937	49.50	J. A. Frischknecht Kuhn Meier & Frank Co.
1925	Dec. 16, 1937	37.15	C. W. Carey Kuhn Meier & Frank Co. The United States National Bank, Portland, Oregon
[52]			
1950	Dec. 23, 1937	35.64	C. W. Carey Kuhn Meier & Frank Co. The United States National Bank, Portland, Oregon
2035	Jan. 3, 1938	84.15	Roy Lamb DeMent Meier & Frank Co. First National Bank, Portland, Oregon
2094	Jan. 13, 1938	31.98	A. R. Reed DeMent Meier & Frank Co. First National Bank, Portland, Oregon
2113	Jan. 15, 1938	49.50	J. A. Frischknecht DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
2125	Jan. 20, 1938	37.97	C. W. Clark DeMent Meier & Frank Co. First National Bank, Portland, Oregon

Number	Date	Amount	Endorsements
2240	Feb. 1, 1938	\$25.24	Robt. Stilson (initial) Meier & Frank Co. The United States National Bank, Portland, Oregon
2259	Feb. 2, 1938	74.25	C. C. Elledge DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
2292	Feb. 10, 1938	45.79	C. W. Clark (initial) Meier & Frank Co. First National Bank, Portland, Oregon
2330	Feb. 15, 1938	49.50	J. A. Frischknecht DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
2337	Feb. 17, 1938	36.38	C. W. Clark Johnson Meier & Frank Co. First National Bank, Portland, Oregon
2473	Mar. 11, 1938	36.33	C. W. Clark DeMent Meier & Frank Co. First National Bank, Portland, Oregon
2586	Mar. 25, 1938	33.73	L. G. Cross DeMent Meier & Frank Co. First National Bank, Portland, Oregon
2687	Apr. 2, 1938	90.68	Ed Thorpe DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon

Number	Date	Amount	Endorsements
2701	Apr. 5, 1938	\$50.23	J. E. Flor DeMent Meier & Frank Co.
2728	Apr. 14, 1938	49.99	C. W. Clark DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
2770	Apr. 21, 1938	36.66	C. W. Clark DeMent Meier & Frank Co. First National Bank, Portland, Oregon
2812	May 2, 1938	84.15	Roy Lamb DeMent Meier & Frank Co. First National Bank, Portland, Oregon
2852	May 13, 1938	29.70	C. W. Clark DeMent Meier & Frank Co. First National Bank, Portland, Oregon
2877	May 19, 1938	28.81	C. W. Clark (initial) Meier & Frank Co. The United States National Bank, Portland, Oregon
2886	May 27, 1938	28.84	C. W. Clark DeMent Meier & Frank Co. First National Bank, Portland, Oregon
2920	June 1, 1938	84.15	Roy Lamb DeMent Meier & Frank Co.
2944	June 3, 1938	74.25	C. C. Elledge DeMent Meier & Frank Co. First National Bank, Portland, Oregon

Number	Date	Amount	Endorsements
2978	June 9, 1938	\$33.86	C. W. Clark DeMent Meier & Frank Co. First National Bank, Portland, Oregon
3039	June 23, 1938	33.24	C. W. Clark Johnson Meier & Frank Co. First National Bank, Portland, Oregon
3059	June 30, 1938	42.17	C. W. Clark DeMent Meier & Frank Co. First National Bank, Portland, Oregon
3126	July 5, 1938	50.00	F. A. Darnielle DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
3156	July 14, 1938	49.50	J. A. Frischknecht DeMent Meier & Frank Co. First National Bank, Portland, Oregon
3184	July 22, 1938	34.15	C. W. Clark DeMent Meier & Frank Co. First National Bank, Portland, Oregon
3264	Aug. 2, 1938	123.75	Ed Thorpe Hallock Meier & Frank Co. The United States National Bank, Portland, Oregon
3266	Aug. 2, 1938	33.66	Kemper Snow G. L. Crowe Bernice Bouman The United States National Bank, Portland, Oregon

Number	Date	Amount	Endorsements	[55]
3265	Aug. 2, 1938	\$123.75	Joe Green G. L. Crowe Cranning & Treece First National Bank, Portland, Oregon	
3373	Aug. 15, 1938	49.50	J. A. Frischknecht DeMent Meier & Frank Co. First National Bank, Portland, Oregon	
3383	Aug. 19, 1938	51.97	C. W. Clark DeMent Meier & Frank Co. First National Bank, Portland, Oregon	
3423	Aug. 26, 1938	47.77	C. W. Clark Hallock Meier & Frank Co. First National Bank, Portland, Oregon	
3461	Sep. 1, 1938	42.57	C. W. Clark DeMent Meier & Frank Co. First National Bank, Portland, Oregon	
3511	Sep. 6, 1938	130.68	C. H. Peters G. L. Crowe Granning & Treece First National Bank, Portland, Oregon	
3512	Sep. 6, 1938	56.43	Fred Mutt G. R. Crowe Bernice Bouman The United States National Bank, Portland, Oregon	
3536	Sep. 8, 1938	46.78	C. W. Clark DeMent Meier & Frank Co. First National Bank, Portland, Oregon	

Number	Date	Amount	Endorsements
3650	Oct. 3, 1938	\$78.41	M. Fennimore DeMent Meier & Frank Co. First National Bank, Portland, Oregon
3691	Oct. 15, 1938	49.50	J. A. Frischknecht DeMent Meier & Frank Co. First National Bank, Portland, Oregon
3698	Oct. 21, 1938	30.63	W. H. Hemming DeMent Meier & Frank Co. [56]
3749	Nov. 1, 1938	89.10	Roy Lamb DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
3895	Nov. 14, 1938	49.50	J. A. Frischknecht Hallock Meier & Frank Co. First National Bank, Portland, Oregon
4223	Jan. 4, 1939	82.37	Ed Thorpe DeMent Meier & Frank Co.
560	Jan. 6, 1939	40.11	W. C. Bumgarner G. L. Crowe Jay Stine First National Bank, Portland, Oregon
4233	Jan. 6, 1939	128.70	W. C. Bumgarner G. L. Crowe Granning & Treece First National Bank, Portland, Oregon
4339	Jan. 27, 1939	42.75	W. B. Farthing DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon

Number	Date	Amount	Endorsements
4408	Feb. 2, 1939	\$4.75	Dick Sperry Garth Crowe Bernice Bouman The United States National Bank, Portland, Oregon
4408	Feb. 2, 1939	79.20	Ed Thorpe DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
4653	Feb. 24, 1939	42.00	C. Clarkson DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
4724	Mar. 3, 1939	76.03	Ed Thorpe Hallock Meier & Frank Co. First National Bank, Portland, Oregon
4725	Mar. 3, 1939	31.68	Henry Robertson DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
4726	Mar. 3, 1939	28.51	Dick Sperry DeMent Meier & Frank Co. The United States National Bank, Portland, Oregon
4996	Apr. 3, 1939	99.00	C. C. Elledge DeMent Meier & Frank Co. First National Bank, Portland, Oregon
5117	Apr. 21, 1939	41.55	C. Warren Hallock Meier & Frank Co. First National Bank, Portland, Oregon

[57]

Each of said checks was negotiated and cashed by Garth L. Crowe, payroll clerk in the employ of said Interior Warehouse Company at the respective times of the drawing and cashing of said checks, by his endorsement of the names of the respective payees on the backs of said checks, the names of such respective payees being those first to appear under the above heading "Endorsements." The originals of all of the above checks were introduced in evidence.

VI.

Plaintiffs also proffered carbon copies of eighteen (18) checks allegedly drawn on said account by said Interior Warehouse Company which carbon copies bore the following respective numbers, dates, amounts and names of payees:

<u>Number</u>	<u>Date</u>	<u>Amount</u>	<u>Payee</u>
B15340	June 18, 1936.....	\$ 14.40	G. Edmonson
A10292	July 1, 1936.....	19.50	Roy Lamb
A10323	July 3, 1936.....	49.50	P. Henning
B15367	July 9, 1936.....	14.40	A. Rieman
[58]			
A10346	Aug. 3, 1936.....	50.00	J. A. Frischknecht
B15566	Aug. 27, 1936.....	43.20	F. N. Alexander
A10622	Dec. 1, 1936.....	80.00	Roy Lamb
B15920	Dec. 10, 1936.....	25.50	W. H. Hemming
3483	Aug. 31, 1938.....	60.38	John Klamert
3496	Aug. 31, 1938.....	8.91	John Klamert
3499	Aug. 31, 1938.....	17.82	J. W. Bradley
3760	Nov. 2, 1938.....	120.78	Ed. Thorpe
3761	Nov. 2, 1938.....	87.12	Kemper Snow
3762	Nov. 2, 1938.....	34.16	Dick Sperry
3965	Dec. 1, 1938.....	89.10	Roy Lamb
4003	Dec. 2, 1938.....	11.09	Dick Sperry
4004	Dec. 2, 1938.....	76.03	Ed. Thorpe
4016	Dec. 5, 1938.....	99.00	C. C. Elledge

Plaintiffs also attempted to prove check number A10230 dated May, 1936, in the amount of \$49.50, but the carbon copy of the same was not produced.

The originals of none of said nineteen (19) checks were produced or offered in evidence and there is no evidence of any of the endorsements on the back thereof, if any, other than the oral testimony of Garth L. Crowe that he endorsed the names of said respective payees on the several checks.

VII.

Each and all of said checks aggregating one hundred twenty-six (126) in number and aggregating \$6,562.33 in amount were forged by the said Garth L. Crowe in that he himself wrongfully endorsed the names of the respective payees of said checks on the backs thereof without any authorization therefor and negotiated and cashed the same and received the money therefor. [59]

VIII.

An aggregate of sixty-three (63) of said checks aggregating in amount \$3,996.53 represented payments to country employees of Interior Warehouse Company who previously had been or subsequently were paid by said company by other means.

An aggregate of twenty-one (21) of said checks aggregating \$812.24 in amount represented payments to fictitious persons who never were authentic employees of said Interior Warehouse Company.

An aggregate of twelve (12) of said checks aggre-

gating \$433.58 in amount represented payments to existing persons who previously had been, but no longer were, authentic employees of said Interior Warehouse Company and who had previously been paid by said company for their services.

The nineteen (19) checks referred to in Paragraph VI hereof aggregating \$950.39 in amount represented payments to employees of said Interior Warehouse Company who previously had been or later were paid by said company by other means.

An aggregate of eleven (11) of said checks aggregating \$369.59 in amount represented payments to Portland, Oregon dock employees of said Interior Warehouse Company who previously had been or later were paid by said company by other means.

IX.

During the entire period of the said negotiation and cashing of said checks by said Garth L. Crowe and in order to account for the same on the books and records of said Interior Warehouse Company, he made irregular and improper entries therein by the following methods:

(a) Increasing dock and country payrolls by adding names and amounts thereto.

(b) Recording in the monthly summary sheet a larger amount than the dock payroll actually showed. [60]

(c) Raising amounts properly due employees.

(d) Charging labor, repairs, insurance or other expense accounts without proper support,

the contra entries being to accounts payable to which irregular disbursements had been charged.

(e) Making direct entries in the ledger without support in a book of original entry.

X.

Regularly at the beginning of each month during the said period of the cashing of said checks by said Crowe, defendant returned to Interior Warehouse Company all of said checks which had been cashed during the previous month, together with defendant's statement showing the cashing of said checks and the then condition of said Interior Warehouse Company's account in defendant bank.

Said Interior Warehouse Company usually permitted said Crowe to accept delivery of said cancelled checks and statements and to check and examine the same in its behalf.

XI.

Said Interior Warehouse Company and plaintiffs on or about October 16, 1939, notified defendant of their claim that payment of said checks by defendant was wrongful, tendered to defendant the one hundred seven (107) checks specified in Paragraph V hereof, and demanded payment of said checks, together with payment of the checks specified in Paragraph VI hereof. Defendant refused to comply with said demand.

XII.

During all of the times herein mentioned, said Interior Warehouse Company had a policy of insur-

ance with the Underwriters at Lloyd's of London by and in which the employees of Interior Warehouse Company, including said Crowe, were bonded and Interior Warehouse Company insured against loss it might [61] sustain by reason of infidelity or dishonesty of any of said employees, including said Crowe. Said policy of insurance was executed and delivered to Interior Warehouse Company in consideration of a premium paid by it therefor to said insurer.

Following the cashing of said checks by said Crowe the Underwriters at Lloyd's of London paid Interior Warehouse Company the sum of \$5,562.33 as and for a loss under said policy of insurance because of the cashing of said checks aggregating that amount by said Crowe. Thereafter Interior Warehouse Company assigned to Underwriters at Lloyd's of London, Interior Warehouse Company's alleged claim against defendant for cashing a number of said checks aggregating \$5,562.33 in amount, and subsequently Underwriters at Lloyd's of London assigned said alleged claim to plaintiff E. L. McDougal.

XIII

During all of the times herein mentioned said Interior Warehouse Company had a policy of insurance with plaintiff American Surety Company of New York by and in which the employees of Interior Warehouse Company, including said Crowe, were bonded and Interior Warehouse Company insured against loss it might sustain by reason of

fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction or willful misapplication of any of said employees, including said Crowe. Said policy of insurance was executed and delivered to Interior Warehouse Company in consideration of a premium paid by it therefor to said insurer.

Following the cashing of said checks by said Crowe said plaintiff paid Interior Warehouse Company the sum of \$1,000.00 as and for a loss under said policy of insurance because of the cashing of said checks aggregating that amount by said Crowe. [62]

XIV

Said Interior Warehouse Company did not discover the negotiation and cashing of said checks by said Crowe within a reasonable time after the negotiation and cashing of the same, and for this reason Interior Warehouse Company thereby misled defendant and the prior endorsers on said checks.

XV.

Defendant was not guilty of any negligence or wrongdoing in the cashing of said checks, or any of them, or in charging the same, or any of them, to the account of said Interior Warehouse Company in defendant bank, and defendant was not involved in any manner in the misconduct of said Crowe in his negotiation and cashing of said checks, or any of them.

From the foregoing Findings of Fact the court draws and makes the following

CONCLUSIONS OF LAW

I.

The court has jurisdiction of this cause. At the time of institution of said cause there existed, and still exists, a diversity of citizenship between the plaintiffs and the defendant. The matter or controversy involved herein exceeds the sum or value of \$3,000.00.

II.

Defendant's said motion should be, in all respects, overruled. [63]

III.

The better view of the law is that the failure of Interior Warehouse Company to discover the negotiation and cashing of said checks by said Crowe within a reasonable time thereafter justifies a denial of recovery against defendant herein either on principles of negligence of Interior Warehouse Company or estoppel against it.

IV.

The principle of election of remedies by Interior Warehouse Company's claim against Underwriters at Lloyd's of London and plaintiff American Surety Company of New York on the theory that its employee, Crowe, had embezzled its money, whereas defendant could be liable only on the theory that it had paid the checks with its own funds, is but a partially satisfactory solution of this case, the decision of which is based primarily upon Conclusions V and VI hereof.

V.

In this case there were independent contractual liabilities, each running in favor of Interior Warehouse Company and none of which ran in favor of or against any of the parties to this cause, *inter se*. The insurers, Underwriters at Lloyd's of London and plaintiff American Surety Company of New York, each by separate contract guaranteed the honesty of Crowe to Interior Warehouse Company. The defendant could be liable to Interior Warehouse Company, if at all, only on principles of a contract between Interior Warehouse Company and defendant.

These were independent contractual obligations and the satisfaction of their primary liability by said insurers under their respective policies of insurance did not give rise to a legal or equitable or any right in them or their assignee or assignees to recover against defendant in this cause. [64]

VI.

The insurers, Underwriters at Lloyd's of London and American Surety Company of New York, in making payments to Interior Warehouse Company fulfilled the obligation of their several contracts to protect Interior Warehouse Company against all losses caused by Crowe's dishonesty. Thereby the insurers were subrogated to all remedies and rights which Interior Warehouse Company had against Crowe. Upon payment to it of these sums the Interior Warehouse Company suffered

no loss. The debt was paid. The fact that Interior Warehouse Company may have had another remedy against defendant on a different contract if Crowe had not been insured does not render defendant liable to the insurers, who as to it stand in the same position as Crowe.

The insurers paid by virtue of their respective contracts to protect the Interior Warehouse Company against all losses caused by Crowe's dishonesty. The Interior Warehouse Company suffered no loss, and there was no claim against defendant which could be assigned or which could inure to the insurers, or either of them, by subrogation.

VII.

Neither on principles of assignment of Interior Warehouse Company's said claim which arose because of the said defalcations of Crowe, nor on principles of subrogation, are plaintiffs or either of them entitled to recover from defendant in this case.

VIII.

Judgment should be entered herein in favor of defendant and against plaintiffs, and each of them, dismissing this cause and awarding to defendant its costs and disbursements herein incurred.

Dated: January 20, 1942.

JAMES ALGER FEE,
Judge.

[Endorsed]: Filed January 20, 1942. [65]

And afterwards, to wit, on the 20th day of January, 1942, there was duly Filed in said Court, Judgment, in words and figures as follows, to wit: [66]

In the District Court of the United States
for the District of Oregon

Civil 265

AMERICAN SURETY COMPANY OF NEW
YORK, a corporation, and E. L. McDOUGAL,
Plaintiffs,

vs.

THE BANK OF CALIFORNIA, NATIONAL
ASSOCIATION, a corporation,
Defendant.

JUDGMENT

The above-entitled and numbered cause having come on for trial before the court sitting without the intervention of a jury on March 25, 1941, which trial continued through March 26, 1941, and March 27, 1941, plaintiff E. L. McDougal appearing in person and by his attorneys Randall S. Jones, Nicholas Jaureguy, Plowden Stott and Maurice D. Sussman, plaintiff American Surety Company of New York appearing by the same attorneys, and defendant appearing by Borden Wood and Robert S. Miller, of its attorneys, and each party hereto having introduced his and its evidence and rested, and the court having considered the briefs of respective counsel and having made and entered herein findings of

fact and conclusions of law in favor of the defendant, and deeming itself advised in the premises, it is hereby

Considered, ordered, adjudged and decreed that the above-named plaintiffs, and neither of them, take anything by reason of their complaint herein but that the same be, and it hereby is, dismissed, and that the defendant have and recover of the plaintiffs, and each of them, defendant's costs and [67] disbursements herein incurred and taxed at \$79.65.

Dated: January 20, 1942.

JAMES ALGER FEE,
Judge.

[Endorsed]: Filed January 20, 1942. [68]

And afterwards, to wit, on the 12th day of March, 1942, there was duly Filed in said Court, an Opinion, in words and figures as follows, to wit: [69]

[Title of District Court and Cause.]

OPINION—DECEMBER 23, 1941

James Alger Fee, District Judge:

This action was brought by American Surety Company of New York, a New York corporation, and E. L. McDougal, a citizen and resident of the State of Oregon, to recover amounts paid by the defendant upon checks carrying forged endorsements. Defendant "The Bank of California, Na-

tional Association", is a corporation organized and existing under and by virtue of the National Banking Laws of the United States. "The place where its banking house or office shall be located and its operations of discount and deposit carried on and its general business conducted shall be the City and County of San Francisco with branches at Portland, Multnomah County, Oregon * * *.¹

The Interior Warehouse Company,² an Oregon corporation, doing business in Portland, was a depositor between October 2, 1935, and May 1, 1939, in the Portland branch of defendant [70] bank, and during all of this period maintained a deposit in excess of the amounts hereinafter shown to have been improperly paid out. Crowe, a bookkeeper of the Interior, prepared but did not sign checks to cover pay-rolls and other incidental expenses. He conceived the scheme of writing additional checks upon defendant bank, either to persons on the pay-rolls in sums beyond what was actually due them, or to non-existing persons, and of obtaining the money thereon by forging the names of the supposed payee. He carried this out successfully over a period of years, forging the endorsements, and generally cashing these checks with Meier & Frank Company, a mercantile establishment in Portland,

¹Excerpt from Article Second of Articles of Association of defendant hereinafter called the "Bank".

²Hereinafter called "Interior".

or with some individual. Crowe was not authorized to sign checks for the Interior, since this authority was vested only in two other employees. Neither of these men knew or suspected the scheme of Crowe, or the forging of the endorsements on the checks which they signed. Crowe compared the bank statements and returned checks with the records upon their receipt by Interior, and was thus able to delay detection. On trial, Crowe testified as to nineteen checks, the originals of which had been destroyed, that he had drawn the latter to fictitious payees and forged the endorsements thereon. The bank objected to the proof of these lost documents.

The American Surety Company of New York and the underwriters at Lloyds in London,³ (assignors of E. L. McDougal), had written policies of insurance by which the employees of Interior, including Crowe, were bonded, and Interior insured [71] against the loss it might sustain by reason of dishonesty of any of these employees. Interior procured and paid for these policies. No insurance was taken by Interior upon its checks, nor indemnity thereon for loss by reason of forgery.

On October 16, 1939, Interior and insurers notified defendant that payments on these checks were unauthorized. Thereafter the insurers paid Interior the full amount of the loss caused by the dis-

³Hereinafter generally designated as the "insurers".

honesty of its employee, and accepted assignment of any rights which Interior might have against the Bank. This action was then brought for \$6,562.33, the amount of the loss thus paid. The Bank contended that diversity of citizenship between it and each of the plaintiffs did not exist. The court overruled the motion based on this contention. The cause came on regularly for trial before the court, sitting without a jury, based upon a pre-trial order which fully set out the issues and listed the documentary evidence.

At the outset the jurisdictional point must be met. The bank contends that it is a citizen of Oregon by virtue of its operation of a branch in this state. The defendant is a corporation formed under the federal banking laws of general application. Formerly, it was a state bank of California and was thus enabled as a "mother bank" to carry its branches into the federal system.⁴

The history of legislation relating to national banks indicates that the statutes contemplate that such an institution shall have situs in one state,⁵ and that jurisdiction [72] of a federal court attaches under the ordinary rules as to diversity of citizenship based on that assumption.⁶ Federal jurisdic-

⁴The Act of Mar. 3, 1865, c. 78, §7, 13 Stat. 484. This Act was amended in 1927 to permit national banks subsequently created to maintain branches. 12 USCA, § 36.

⁵12 USCA, § 22, § 81.

⁶28 USCA § 41, subd. (1) and (16).

tion is not any longer based upon the fact of federal incorporation of a bank.⁷ Nor has the opposite view been adopted by Congress, namely, that such incorporation carries with it citizenship in each state of the Union. The intent of the statutes is to steer a middle course and to confer upon a national bank the right to come into or remove a cause to a United States court in common with private corporations invested with powers by the several states.⁸ The state of incorporation is the criterion of residence and citizenship of corporations authorized by the laws of the various states.⁹ Congress intended that analogous tests should be applied in cases of entities endowed with existence by federal power. The principal place of business is the distinguishing factor. Dual incorporation has not been the rule with corporations organized in the various states,¹⁰ probably because the right to go into a federal court outside the state of incorporation might be thereby lost.

The whole doctrine of diversity of citizenship of corporations is founded upon a judicial fiction¹¹ of

⁷28 USCA § 41, subd. (16) n. 6.

⁸Continental National Bank of Memphis vs. Buford, 8 Cir. 191 U. S. 119.

⁹St. Louis Nat. Bank vs. Allen, Cir. Ct. D. of Iowa, 5 F. 551; Fulton National Bank of Atlanta vs. Hozier, 5 Cir. 267 U. S. 276; New England Nat. Bank of Kansas City vs. Calhoun, 8 Cir. 9 F. (2d), 272.

¹⁰See St. Louis and San Francisco Railway Company vs. James, 8 Cir. 161 U. S. 545; Southern Railway Company vs. Allison, 190 U. S. 326.

extremely technical character. Reasoning from such artificial premises is illusory. In view of the historical sanction, it is [73] believed Congress used the doctrine as a foundation for the enactments relating to national banks. Although, then, the modern tendency has been to limit jurisdiction based on diversity of citizenship actual or implied, no hardship or inconvenience is discovered in the application of a rule analogous to that of state corporations.¹² Therefore, until the entire foundation crumbles, a national bank should be considered as a citizen of the state where it has its principal place of business, irrespective of the fact that it has authorized branches in other states. A state corporation carries on business in many states and may have branches widely scattered, yet it is a citizen of the state where it is incorporated. The court has jurisdiction, because the Bank must be viewed as a citizen of California. Questions of venue were waived.

An examination of the merits is now required. There is no binding authority in the state of Oregon upon the exact situation here presented. Many authorities have been cited from other jurisdictions. But calculations of numerical weight of authority from other jurisdictions will not suffice. This court

¹¹Bank of the United States vs. Deveaux, 9 U. S. 61.

¹²Under the legislation as to banking transactions, the branch can be viewed as a "separate business entity". 12 USCA §§ 601-604. Pan-American Bank & Trust Co. vs. National City Bank of New York, 2 Cir. 6 F. (2d), 762; In re Harris, 27 F. Supp. 480.

must attempt to give weight to the considerations which, judged from previous utterances, will affect the Supreme Court of Oregon, when that tribunal deals with a state of facts such as is here presented.

The rule is uncontroverted in most jurisdictions that a bank, which receives a deposit, makes a contract that it will [74] pay out the money only upon the order of the depositor.¹³ If, therefore, a bank pays money upon the depositor's check bearing a forged endorsement of the name of the payee, the bank is liable therefor.¹⁴ This position is ordinarily justified in legal theory by the presumption that the bank under such circumstances pays out its own money and not the money of the depositor.¹⁵ The depositor, on the other hand, is not required to know the signature of the payee of his check.¹⁶ He

¹³ Grants Pass & Josephine Bank vs. City of Grants Pass, 145 Oregon, 624.

¹⁴ Leather Manufacturers' Bank vs. Merchants' Bank, 128 U. S. 26, 34; Midland Savings & Loan Co. vs. Tradesmen's Nat. Bank of Oklahoma City, Okl. 10 Cir. 57 F. (2d), 686.

¹⁵ Board of Education of Jefferson Tp. vs. National Union Bank of Dover, 16 New Jersey Miscellaneous 50.

¹⁶ National Surety Company vs. President and Directors of Manhattan Company, 252 New York 247; Detroit Piston Ring Co. vs. Wayne County & Home Savings Bank, 252 Michigan 163; Los Angeles Investment Company vs. Home Savings Bank of Los Angeles, 180 California 601; William D. Shipman vs. Bank of State of New York, 126 New York 318; Jordan Marsh Company vs. National Shawmut Bank, 201 Massachusetts 397; United States Cold Storage Company vs. Central Manufacturing District Bank, 343 Illinois 503. See England Nat. Bank vs. United States, 8 Cir. 282 F. 121.

may, therefore, receive back the statements of his account, accompanied by cancelled checks with forged endorsements of the respective payees and hold these without examination, and the bank will still be liable to pay him all moneys which it has not disbursed in accordance with his order.

This general rule has been questioned, however, where a trusted employee of a large concern supplies the data upon which the checks are drawn to one of the officers charged with signing the checks and, thereafter, forges the checks which he has theretofore improperly submitted to such an officer. Under such circumstances, some courts will hold [75] that the depositor had no duty at any time with regard to either its employee or the forged endorsements on the checks.¹⁷ Other courts hold there was a duty owed to the public to supervise the employee and there was a further duty to see that checks for amounts which the concern did not owe should not be consistently placed in the hands of the public nor offered to the drawee bank.¹⁸ The better view would seem to be that if such conduct were long pursued, a denial of recovery from the drawee bank could be justified, either on principles of negligence or estoppel.

In this case the court finds that the Interior did

¹⁷ National Surety Company vs. President and Directors of Manhattan Company, *supra*; Detroit Piston Ring Co. vs. Wayne County & Home Savings Bank, *supra*.

¹⁸ Young vs. Gretna Trust & Savings Bank, 184 Louisiana, 872; Defiance Lumer Company vs. Bank of California, N. A., 180 Washington, 533.

not discover within a reasonable time that checks for amounts which it did not owe on payrolls were consistently signed by its responsible officers and, thereafter, forged by its dishonest employee, Crowe, and that thereby defendant and the prior endorsers were misled. The Bank was not guilty of negligence and was not involved in the misconduct of Crowe. It is liable, if at all, solely on the contract implied from the deposit by Interior. Since there is no decision of the state courts upon this point cited, however, no attempt will be made to determine the instant case on this ground.

Irrespective of whether the Bank was liable to Interior, its liability to the insurers presents an entirely different problem. Courts of many jurisdictions, which are entitled to the highest respect, have held that a bank is liable to a [76] surety¹⁹ under circumstances similar in certain phases to those in the case at bar.²⁰ The controlling factors in these decisions are, usually, the rule that the Bank is absolutely liable wherever it pays out money on a forged endorsement of the payee,²¹ and, secondly,

¹⁹It might be doubtful whether the insurers stand in the same position as sureties, but the cause has been argued upon that assumption. This is apparently true, also, in the case of *American Central Insurance Co. vs. Weller*, 106 Oregon 494.

²⁰*National Surety Company vs. President and Directors of Manhattan Company*, *supra*; *Fidelity & Deposit Co. of Maryland vs. Fort Worth Nat. Bank*, Bd. of Com. Appeals (Texas) 1933; *Grubnau vs. Centennial National Bank*, 279 Pennsylvania 501.

²¹*Grubnau vs. Centennial National Bank*, *supra*.

the alleged principle that a surety is entitled to all the remedies which "the creditor would have against all persons liable for the debt".²²

These decisions neglect consideration of the fact that the forger is the only wrongdoer in the situation. Likewise, they neglect consideration of the highly equitable nature of subrogation.

However, it is strongly urged that the Oregon Supreme Court accepted the reasoning of these cases in *United States Fidelity Co. vs. United States Nat. Bank*, 80 Oregon, 361. In that case, an individual had his own deposit in a bank and also an account as guardian for an incompetent. He withdrew all the money from his individual account, but the bank thereafter still honored his individual checks, charging them against the guardianship fund. It was held that the surety on the bond of the guardian, which paid the amount of the defalcation accomplished by the [77] payment of the individual checks, was entitled to recover from the bank. The court say:

"The bank, by its wrongful act in paying out the funds on the private checks of another, made it possible for that other to squander the money of the wards, and thus became in effect a joint tort-feasor liable for the resulting defalcation."

Here, if the Bank had knowingly abetted Crowe

²²*National Surety Co. vs. National City Bank of Brooklyn*, 172 New York Supplement, 413, 415.

in his unlawful acts, the situations would be comparable. This decision need not be referred to any principle of suretyship. A bank which claims it has paid money which belonged to Jones upon a check written by Smith is liable to Jones or the assignee of Jones for the full amount of his deposit, in any event.

Indeed, the Oregon court has on the contrary canalized this doctrine as to sureties by strict limitations. In *American Central Insurance Co. vs. Weller*, 106 Oregon 494, 502, the court say, with regard to the right of subrogation:

“It rests upon the maxim that no one should be enriched by another’s loss and may be invoked wherever justice demands its application, in opposition to the technical rules of law.”

Also quoting 25 Ruling Case Law, page 1313, Section 2, it is said:

“‘One who has indemnified another in pursuance of his obligation so to do succeeds to, and is entitled to, a cession of all the means of redress held by the party indemnified against the party *who has occasioned the loss.*’²³

“4. It is unquestionably the general rule that on payment of a loss, the insurer acquires the right to be subrogated *pro tanto* to any right of action which the insured may have against any third person *whose wrongful act or neglect caused the loss* * * *²³ [78]

²³ Emphasis supplied.

The doctrine thus announced carries the important limitations phrased in the italicized portions above,²⁴ which fact is apparently overlooked in many of the cases from other jurisdictions above cited.

The limited application of the principle thus supported by the Oregon Court has been applied in other jurisdictions with variations. The surety has been denied recovery against a third party, (1) because there is an election of remedies where the surety is required to pay the loss, (2) because the primary cause of the loss was misconduct for which the surety bound itself, and no other party innocent thereof should be held responsible, (3) because subrogation can only be applied against the party causing the loss, and not against innocent parties independently liable for the amount of the loss.

An excellent illustration of the first variation of the application of this principle²⁵ is found in *United States Fidelity & Guaranty Co. vs. Fidelity National Bank & Trust Co.*, 232 Missouri Appeal 412. There, one Cheney, an employee of Continental, had forged endorsements on certain checks which were cashed by the bank in which Continental had a de-

²⁴ See also *American Bonding Co. vs. State Savings Bank*, 47 Montana 332; *American Surety Co. of New York vs. Lewis State Bank*, 5 Cir. 58 F. (2d), 559, 560-1; *Meyers vs. Bank of America National Trust & Savings Association*, 11 California (2d) 92.

²⁵ See also *National Surety Co. vs. Perth Amboy Trust Co.* 3 Cir. 76 F. (2d), 87, 90; *Midland Savings & Loan Co. vs. Tradesmen's Nat. Bank of Oklahoma City, Okl.*, *supra*, 693.

posit. The surety company had written a bond against loss [79] for misfeasance by Cheney. With full knowledge of the facts, Continental demanded and received payment of its loss by the surety. The court held thereby Continental had affirmed the act of the bank in paying the money out of the account of Continental, and that the surety took no rights by subrogation or assignment.

This theory of election of remedies is not entirely satisfactory, since it leaves out of consideration the onus of guilt which the surety bound itself by contract to assume. Plaintiffs here assert that surety companies, if such a test were adopted, would require the party insured to bring action against the bank first. The practical answer is that they will not remain in the business long if they attempt such measures.

The courts which adopt the second application of the principle above set out indicate that when the sureties pay the loss created under such circumstances they do nothing more than to satisfy the obligation which they assumed for hire. Public policy requires that when a loss predicated upon dishonesty is paid by surety who has assumed that obligation, no subrogation should follow except against the wrongdoer.²⁶ This doctrine is exempli-

²⁶ See *American Bonding Co. vs. Welts*, 9 Cir. 193 F. 978, 980-1; *United States Fidelity & Guaranty Co. vs. Title Guaranty & Surety Co.*, (D. C.), 200 F. 443, 448-9; *Washington Mechanics' Savings Bank vs. District Title Ins. Co.*, Cir. D. C. 65 F. (2d), 827, 830; *American Bonding Co. vs. First National Bank of Covington*, 27 Kentucky Law 393.

fied by the leading case of *National Surety Co. vs. Arosin*, 8 Cir. 198 F. 605. In the last cited case, Bourne was county auditor, for whose official conduct plaintiff surety company had made itself responsible. Bourne made up false redemption warrants. Some of these [80] were cashed upon forged endorsements upon National German-American Bank, where the county had a deposit. The court held the bank was not liable since the misconduct of Bourne, for which the surety had made itself liable, was the primary cause of the loss.

There are several cases which in net result hold that where the bond is written conditioned upon the honesty of a person who defaults and the loss is paid by his surety, there can be no subrogation.²⁷ Criticism has been directed to this doctrine where applied to other than official bonds. However, the consequences are the same. The court believes the principle generally applicable. The wrongdoer should bear the loss. Any surety who has made itself responsible for him should suffer the loss, without recourse.

The third ground is buttressed by cases such as *New York Title & Mortgage Co. vs. First National Bank of Kansas City*, 8 Cir. 51 F. (2d), 485, 487.²⁸

²⁷ *American Surety Co. vs. Citizens' Nat. Bank*, 8 Cir. 294 F. 609; *American Bonding Company vs. Welts*, *supra*; *Stewart vs. Commonwealth*, 104 Kentucky 489; *American Bonding Co. vs. State Savings Bank*, *supra*.

²⁸ See also *American Bonding Co. vs. First National Bank of Covington*, *supra*; *Louisville Trust Company vs. Royal Indemnity Company*, 230 Kentucky, 482.

In that case, a loan broker procured issuance by title company of title insurance policies to a loan association guaranteeing the latter against loss by reason of defects in title of mortgagors to real estate covered by certain mortgages. The notes and the mortgages were in fact forged by the loan broker. The checks [81] drawn upon the bank by the loan association were then forwarded. Whereupon the loan broker obtained delivery thereof, forged the names of the supposed borrowers and cashed them. The title company paid the loss to the loan association and brought action against the bank because it had cashed checks on which the endorsements of the respective payees had been forged. The court held that no recovery could be allowed because there were two primary obligations running to the loan association from the title company and the bank, neither of which was a wrongdoer, and that subrogation would not be applied as a remedy. The court say:

“But if there were any doubt as to the soundness of this position, we think it clear that plaintiff is not entitled to invoke the remedy of subrogation, because that right is an equitable one, and is applicable in cases in which one party is required to pay a debt for which another is primarily answerable, and which, in equity and good conscience, ought to be discharged by the latter. It is the method which equity employs to require the payment of the debt by him who in good conscience ought to

pay it, and to relieve him whom none but the creditor could ask to pay.”

This identical recognition of the equitable nature of subrogation was also made by the Supreme Court of Oregon in the case of *American Central Insurance Company vs. Weller*, supra, 507, under the following circumstances:

Weller sold an automobile to Miller upon a down payment sufficient to cover among other things cost of insurance and a conditional sales contract. This contract was assigned to a bank and payment guaranteed by Weller, who also took out [82] insurance, named Miller as assured, which insured also against conversion, loss payable to the bank or Miller as their interests might appear. Miller himself thereafter converted the car. The insurer paid the loss to the bank, taking an assignment of the conditional sales contract and the guaranty of Weller and brought action against the latter. The court held that, since the insurer had no contract as to the debt but a primary liability as to the conversion of the car, upon payment thereof the debt which arose on the contract of guarantee was extinguished and that insurer had no rights either by subrogation or assignment.

The court say:

“37 Cyc. 370 reads: The right of subrogation, as a general rule

‘is broad enough to include every instance in which one party is required to pay a debt for which another is primarily an-

swerable, and which, in equity and good conscience, ought to be discharged by the latter, and is the mode which equity adopts to compel the ultimate discharge of the debt by him who, in good conscience, ought to pay it, and to relieve him whom none but the creditor could ask to pay.' (Italics ours.)

“6. Weller as guarantor comes within the class that should be relieved under the rule mentioned. No one but the creditor, Ashley & Rumelin, could ask him to pay. When the insurance company paid the \$300 on the policy the debt was satisfied to that amount as to Weller, *and could not be assigned.*”²⁹ [83]

If the Oregon courts were confronted with the facts here involved, it is believed the principles announced in the last quoted case would be followed.

The proper field for decision is then furnished by a consideration of the rights acquired by the insurers upon payment of the loss. Interior had authorized certain employees to sign checks. Each of the checks in question was properly signed. But the obligation of the insurers upon their separate contracts was to pay the loss caused by fraudulent conduct, embezzlement, theft or dishonesty of certain employees. The insurers had no responsibility for checks of Interior, even though forged.

²⁹ Emphasis supplied. See *Meyers vs. Bank of America National Trust & Savings Association*, *supra*.

The independent liability of the Bank to Interior arose from an entirely different contract, which resulted from the deposit made by Interior. The Bank broke its engagement when it cashed checks which did not bear the endorsements of the respective payees. As respects liability on this contract, it mattered not whether Crowe was an employee of Interior. The Bank had no special engagement as to him. It would have been liable if the endorsement had been forged by an entire stranger.

Thus, the liabilities of the insurers and the Bank, respectively, to Interior were entirely diverse. Each was contractual, but each was founded on a different contract. The Bank received consideration for its engagement in the deposit made by Interior. The insurers were paid premiums by Interior for their undertakings. The finding above made, regarding the issuance of apparently valid checks by Interior, should not be disregarded in the consideration of the relative [84] positions of the insurers and the Bank. In order to operate with confidence and with less supervision, Interior had insured itself against the dishonesty of its employees, including Crowe. In reliance on these policies, Interior took less precaution, probably, and the way was open for Crowe to use checks which appeared valid upon their faces to perpetrate fraud upon Interior, the endorsers, the collecting Banks, and the defendant Bank. The insurers made themselves primarily responsible for the defalcation of Crowe. The dishonesty of Crowe was the sole cause of the loss sustained by anyone.

If it had not been for that factor, no loss would have occurred. One should not be entitled to recover from another that which he has paid out in discharging a debt in the performance of his own obligation.”

Interior is not entitled to more than one recovery. If the Bank paid now there would be a dual recovery. The surety has paid the loss upon its undertaking, and thus liquidated the debt. This is made clearer by disregarding precedent and looking at realities. In the event the defaulting employee himself had paid the amount of the loss to the Interior, no court would permit Interior thereafter to recover against the Bank. It is held that when the Bank cashed the forged checks it had used its own money. The forger then received the money of the Bank. If he paid the Interior he would have used the money of the Bank, and thereafter Interior [85] would have had no claim against the Bank. Because of his dishonesty and default, the insurers paid money to Interior. This money was paid by the insurers to replace the money belonging to the Bank. Once it came into the hands of Interior, the latter was entitled to call on the Bank solely for the balance of its deposit, less the amount which had been finally paid to it by insurers.

The sole cause of the loss was the conscious dis-

³⁰ See *Amick vs. Columbia Casualty Co.*, 8 Cir. 101 F. (2d), 984, 986; *Commercial Casualty Ins. Co. vs. Petroleum Pipe Line Co.*, 10 Cir. 83 F. (2d), 412, 414.

honesty of Crowe, the only person who benefited by the forgeries of these checks. According to the record, he has made no restitution to anyone. If the Bank is required to pay this money, the chance of recovery from Crowe is slight. If the sureties recover from the Bank, their interest in the matter will be slight. Probably, for a consideration in view of such results the sureties would again insure Crowe. There is no evidence that he has been prosecuted civilly or criminally. He is the wrongdoer. All other parties are innocent. He should bear the loss. But here the insurers agreed to bear the burden for him, if he was guilty of dishonesty. This is exactly the obligation which they assumed for hire.

This situation is brought into highlight by the fact that after they paid the loss, the insurers procured the forger to come into court to testify what he did in order to take advantage of Interior. He co-operated by testifying as to his own wrongful acts.

If recovery is permitted against the Bank, the situation will be prolific of litigation. The defendant can sue the collecting banks, and these can sue Meier & Frank Company and other primary endorsers. Plaintiff suggests [86] that the loss will eventually fall upon the insurance companies protecting some of these concerns. To the court it seems more reasonable to allow the loss to remain on the plaintiff insurers. They guaranteed the honesty of Crowe. They have paid the loss. The burden is resting where it belongs.

Interior had an independent right on contract against the Bank. But its primary right was against Crowe and his insurers. The insurers paid the money for Crowe, and under the principle laid down by the Oregon Supreme Court they have a remedy against Crowe who was primarily responsible.

Only Interior could ask the Bank to pay. The latter was innocent of wrongdoing, but had broken its contract. It would be unconscionable and unjust to hold the Bank responsible for the unlawful acts of Crowe. When the insurers paid the loss on the policies, the debt was satisfied. There was nothing which insurers were entitled to recover either on principles of subrogation or by assignment.³¹ Neither right nor remedy longer subsisted.

Findings and judgment may be prepared.

[Endorsed]: Filed March 12, 1942. [87]

And afterwards, to wit, on the 18th day of April, 1942 there was duly Filed in said Court, Notice of Appeal, in words and figures as follows, to wit: [88]

³¹ *Meyers vs. Bank of America National Trust & Savings Association*, *supra*; *Louisville Trust Company vs. Royal Indemnity Company*, *supra*; *American Surety Company of New York vs. Lewis State Bank*, *supra*.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Bank of California National Association, a Corporation, the above named defendant; and

To Messrs. McCamant, King & Wood, Borden Wood, and Robert S. Miller, attorneys for defendant:

Notice Is Hereby Given that American Surety Company, a corporation, and E. L. McDougal, the above named plaintiffs, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from each and every part and from the whole of that certain final judgment dated and entered in the above entitled cause January 20, 1942.

Dated this 18th day of April, 1942.

MAURICE D. SUSSMAN

E. L. McDOUGAL

PLOWDEN STOTT

NICHOLAS JAUREGUY

Attorneys for Plaintiffs. [89]

State of Oregon

County of Multnomah.—ss.

Due and legal service of the foregoing Notice of Appeal is hereby acknowledged at Portland, Multnomah County, Oregon, this 18th day of April, 1942, by receipt of a duly certified copy thereof as required by law.

McCAMANT, KING & WOOD

Of Attorneys for Defendant.

[Endorsed]: Filed April 18, 1942. [90]

And Afterwards, to wit, on the 18th day of April, 1942 there was duly Filed in said Court, a Bond for Costs on Appeal, in words and figures as follows, to wit: [91]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents that American Surety Company of New York, a corporation, and E. L. McDougal, the plaintiffs above named, as principals, and United Pacific Insurance Company, a Washington corporation, as surety, are held and firmly bound unto The Bank of California National Association, a corporation, the above named defendant, in the penal sum of Two Hundred Fifty Dollars (\$250.00), for the payment of which we firmly bind ourselves, our successors, assigns, executors, and administrators.

The condition of this obligation is such that

Whereas, the said American Surety Company of New York, a corporation, and E. L. McDougal, have appealed to the United States Circuit Court of Appeals for the Ninth Circuit from that certain final judgment entered in the above entitled court and cause on the 20th day of January, 1942.

Now, Therefore, if the said appellants shall pay all costs if said appeal is discussed or the judgment affirmed, and shall pay such costs as the appeal court shall award against them, or either of them, if such

judgment be modified, then this obligation shall be void, otherwise in full force [92] and effect.

Executed this 18th day of April, 1942.

AMERICAN SURETY COMPANY
OF NEW YORK, a Corporation,

By W. A. KING

E. L. McDOUGAL

Principals.

[Seal]

UNITED PACIFIC INSURANCE
COMPANY,

a Washington corporation,

By H. T. CURTIS

Attorney-in-fact.

Surety.

State of Oregon,

County of Multnomah—ss.

Due and legal service of the foregoing Bond for Costs on Appeal is hereby acknowledged at Portland, Multnomah County, Oregon, this 18th day of April, 1942, by receipt of a duly certified copy thereof as required by law.

McCAMANT, KING & WOOD

Attorneys for Defendant.

[Endorsed]: Filed April 18, 1942. [93]

And Afterwards, to wit, on the 21st day of May, 1942, there was duly Filed in said Court, a Motion for Order Extending Time to file record and Docket cause in Appellate Court, in words and figures as follows, to wit: [94]

[Title of District Court and Cause.]

MOTION FOR ORDER EXTENDING TIME TO
FILE RECORD AND DOCKET CAUSE IN
APPELLATE COURT.

Come now the plaintiffs-appellants in the above entitled cause, by and through Maurice D. Sussman, of their attorneys, and move the Court for an order extending the time to file the record on appeal and docket the cause in the Appellate Court to and including the 25th day of June, 1942, and in support of this Motion respectfully represents as follows:

That the Notice of Appeal was filed on the 18th day of April, 1942, and that forty (40) days from said date have not yet elapsed, that because of the large number of exhibits introduced at the trial and which are a part of the record of this case, the parties, in order to save expense and to shorten the record and make same more feasible and convenient to be included in the transcript of record and for review by the Appellate Court, desire to shorten the record by stipulation and to properly do so, it is necessary that the parties have before them the transcript of testimony presented at the trial, which transcript has not yet been completed by the court reporter, and by reason of this fact, and the time necessary to prepare proper stipulation, additional time is necessary to properly prepare the record for the Appellate Court.

MAURICE D. SUSSMAN

Of Attorneys for Plaintiffs-Appellants.

[Endorsed]: Filed May 21, 1942. [95]

And Afterwards, to wit, on the 21st day of May, 1942 there was duly Filed in said Court, a Stipulation for extension of time to file record on appeal, in words and figures as follows, to wit: [96]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the attorneys for the above named plaintiffs-appellants and the attorneys for the defendant-appellee, that the plaintiffs-appellants may have to and including the 25th day of June, 1942, in which to file the record and docket the above entitled cause in the Circuit Court of Appeals for the Ninth Circuit.

Dated this 19th day of May, 1942.

PLOWDEN STOTT,
NICHOLAS JAUREGUY,
MAURICE D. SUSSMAN, and
E. L. McDOUGAL,

Attorneys for Plaintiffs-
Appellants.

McCAMANT, KING & WOOD,
Attorneys for Defendant-
Appellee.

[Endorsed]: Filed May 21, 1942. [97]

And Afterwards, to wit, on Thursday, the 21st

day of May, 1942, the same being the 70th Judicial day of the Regular March 1942 Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [98]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD ON APPEAL

Based upon the Motion of the plaintiffs-appellants, and the stipulation between the attorneys for the parties to the above entitled action, and the Court being fully advised,

It Is Hereby Ordered That the plaintiffs-appellants may have to and including the 25th day of June, 1942, in which to file the record and docket the above entitled cause in the Circuit Court of Appeals for the Ninth Circuit.

Dated this 21st day of May, 1942.

[s] JAMES ALGER FEE
Judge.

[Endorsed]: Filed May 21, 1942. [99]

And Afterwards, to wit, on the 19th day of June, 1942 there was duly Filed in said Court, an Amended Designation of Contents of Record on Appeal, in words and figures as follows, to wit: [100]

[Title of District Court and Cause.]

AMENDED DESIGNATION OF CONTENTS
OF RECORD ON APPEAL.

The American Surety Company of New York, a corporation, and E. L. McDougal, plaintiffs above named, and the appellants in the appeal of the above entitled case to the United States Circuit Court of Appeals for the Ninth Circuit, hereby designate the complete record, proceedings and evidence in said case for inclusion in the record on appeal and the same includes the following:

Complaint.

Motion of defendant to dismiss.

Affidavit in connection with defendant's motion to dismiss.

Order reserving motion to dismiss to time of trial.

Answer.

Pre-trial order.

Transcript of Testimony.

All exhibits admitted at the trial.

Order overruling defendant's motion to dismiss.

Findings of fact and Conclusions of law.

Judgment.

Written opinion on merits.

Defendant's notice of appeal.

Defendant's bond for costs on appeal.

Designation of contents of record on appeal.

Order extending time in which to file the record and docket the above entitled cause in the Circuit Court of Appeals.

Stipulation of parties with reference to the omission of the printing of some of the exhibits.

Order that all original exhibits be sent to the Circuit Court of Appeals.

Dated this 19th day of June, 1942.

MAURICE D. SUSSMAN

E. L. McDOUGAL

PLOWDEN STOTT

NICHOLAS JAUREGUY

Attorneys for Plaintiffs.

State of Oregon,

County of Multnomah—ss.

Due service of the within Amended Designation of Contents, etc. is hereby accepted in Multnomah County, Oregon, this 18th day of June, 1942, by receiving a copy thereof duly certified to as such by Maurice D. Sussman, one of the attorneys for plaintiffs.

BORDEN WOOD,

Of Attorneys for Defendant.

[Endorsed]: Filed June 19, 1942. [101]

And Afterwards, to wit, on the 19th day of June, 1942 there was duly Filed in said Court, Stipulation re omission of the printing of some of the Exhibits, in words and figures as follows, to wit: [102]

[Title of District Court and Cause.]

STIPULATION re EXHIBITS

For the purpose of reducing the record in the Circuit Court of Appeals and in order to eliminate issues upon which there is now no controversy, the parties hereto hereby enter into this stipulation, but this stipulation shall not be construed as preventing either party hereto from including in the record on appeal any portions of the record which the parties would be entitled to include therein in the absence of this stipulation.

PRESENTATION OF CLAIMS AND PAYMENTS TO INSURED.

It is further stipulated and agreed that upon discovery of the loss claimed to have been sustained by Interior Warehouse Company, a corporation, that corporation duly made claim upon American Surety Company of New York and upon Lloyds of London for payment upon the respective policies which are in evidence in this case, that payment was duly made by said Lloyds of London to said Interior Warehouse Company in the sum of \$5,562.33, that payment was duly made by said American Surety Company of New York to said Interior Warehouse Company in the sum of \$1000.00, said payments being received by said Interior Warehouse Company in payment of said loss and in satisfaction of the obligations under [103] said respective policies. That plaintiffs' exhibits 10, 11,

12, 13, 13A, 15, 16, 17 and 18 were relied upon to prove the facts stipulated to in this paragraph.

PLAINTIFFS' EXHIBITS

It is Stipulated and Agreed that plaintiffs' exhibit 1 consists of 107 original checks listed in Paragraph VIII of plaintiffs' complaint and in Schedules 1, 2, 3, and 4 of plaintiffs' Exhibit 3 ("Statement of Funds Withdrawn, with accompanying schedules, prepared by Price, Waterhouse & Company"); that it shall not be necessary to include all said checks in the designation of the record for printing, but that the parties may include such of said checks for printing as they may desire.

Plaintiffs' Exhibit 2 consists of 19 carbon copies of the "face only" of the alleged checks listed in Paragraph VIII of plaintiffs' complaint and in schedule 5 of said exhibit 3, and since these are carbon copies of the "face only", no endorsements of said checks appear; that it shall not be necessary to include all said carbon copies for printing, but the parties hereto may designate for printing such of said carbon copies of checks as they may desire.

DEFENDANT'S EXHIBITS

It is Further Stipulated and Agreed that defendant's exhibits 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33 and 34 are respectively the identical documents and records as specified in paragraph 2 of the Pre-trial Order, and as explained by the various

witnesses, and that in each instance in which any witness described any of said exhibits or related the contents thereof, such testimony correctly stated the facts. As a further description of defendant's exhibit 24, it is agreed that it consists of cancelled checks and bank statements delivered by the [104] defendant, The Bank of California, to said Interior Warehouse Company, each month covering the period from January 1935 to June 1939, and that the average number of checks per month was approximately 275. On each of the statements, on the lower right-hand portion thereof, is found in printing the following legend: "Please examine at once. If no error is reported in ten days, this account will be considered correct."

SENDING OF ORIGINAL EXHIBITS AND OMISSION OF PORTIONS FROM PRINTED RECORD.

It is Further Stipulated and Agreed that all the exhibits introduced in the trial be sent to the Circuit Court of Appeals in the original form and that appellants may obtain an order directing the Clerk of the District Court to send said exhibits, and further that the appellants may apply to the Circuit Court of Appeals for the Ninth Circuit for an order permitting them to omit certain exhibits from the printed record, and that only material portions of certain other exhibits be printed, but that the order dispensing with the necessity of printing all the

exhibits should allow the parties to refer to any of said exhibits in their briefs and arguments by reference to the original exhibits.

Dated this 18th day of June, 1942.

PLOWDEN STOTT,
NICHOLAS JAUREGUY,
MAURICE D. SUSSMAN and
E. L. McDOUGAL,
Attorneys for Plaintiffs-
Appellants.
McCAMANT, KING & WOOD,
Attorneys for Defendant,
Appellee.

[Endorsed]: Filed June 19, 1942. [105]

And Afterwards, to wit, on the 22nd day of June, 1942 there was duly Filed in said Court, a Stipulation for time to file record on appeal, in words and figures as follows, to wit: [106]

[Title of District Court and Cause.]

STIPULATION.

It Is Hereby Stipulated and Agreed by and between the attorneys for the above named plaintiffs-appellants and the attorneys for the defendant-appellee, that the plaintiffs-appellants may have to and including the 10th day of July, 1942, in which to file the record and docket the above entitled cause in the Circuit Court of Appeals for the Ninth Circuit.

Dated this 20th day of June, 1942.

PLOWDEN STOTT,
NICHOLAS JAUREGUY,
MAURICE D. SUSSMAN,
E. L. McDOUGAL,

Attorneys for Plaintiffs-
Appellants.

McCAMANT, KING & WOOD,
Attorneys for Defendant-
Appellee.

[Endorsed]: Filed June 22, 1942. [107]

And Afterwards, to wit, on Monday, the 22nd day of June, 1942, the same being the 96th Judicial day of the Regular March 1942 Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [108]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD ON APPEAL

Based upon the Stipulation between the attorneys for the parties to the above entitled action, and the Court being fully advised,

It Is Hereby Ordered that the plaintiffs-appellants may have to and including the 10th day of July, 1942, in which to file the record and docket the

above entitled cause in the Circuit Court of Appeals for the Ninth Circuit.

Dated this 22nd day of June, 1942.

JAMES ALGER FEE

Judge.

[Endorsed]: Filed June 22, 1942.

And Afterwards, to wit, on Monday, the 22nd day of June, 1942, the same being the 96th Judicial day of the Regular March 1942 Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [110]

[Title of District Court and Cause.]

ORDER RE EXHIBITS

Based upon the stipulation between the parties to the above entitled action, by and through their attorneys, and the Court being fully advised,

It Is Hereby Ordered and the clerk of this Court is hereby directed to send all the original exhibits introduced in the trial of the above case to the Circuit Court of Appeals for the Ninth Circuit.

Dated this 22nd day of June, 1942.

JAMES ALGER FEE

Judge.

[Endorsed]: Filed June 22, 1942. [111]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL.

United States of America,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 111 inclusive, constitute the transcript of record on appeal from a judgment of said Court in a cause therein numbered Civil 265, in which American Surety Company of New York, a corporation, and E. L. McDougal are plaintiffs and appellants, and The Bank of California, National Association, a corporation, is defendant and appellee; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed therein by appellants and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said Court in said cause, as the same appear of record and on file at my office and in my custody, in accordance with the said designation.

I further certify that the cost of the foregoing transcript is \$5.00 for filing Notice of Appeal, and \$20.55 for comparing and certifying the within transcript, making a total of \$25.55 and that the same has been paid by the said appellants.

I further certify that I am transmitting with said transcript, the duplicate of the reporter's transcript filed in the Clerk's office.

I further certify that I am transmitting to the Circuit Court of Appeals for the Ninth Circuit, pursuant to an order of the District Court of the United States for the District of Oregon, all of the original exhibits introduced as evidence at the trial of the said cause.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this 25th day of June, 1942.

[Seal] G. H. MARSH,
Clerk. [112]

[Title of District Court and Cause.]

TESTIMONY

Portland, Oregon, March 26, 1941.

10:20 o'clock A.M.

Be It Remembered that, on this 26th day of March, 1941, at the hour of 10:20 o'clock A.M. thereof, the above entitled cause came regularly on for hearing before the above entitled court, the Honorable James Alger Fee, Judge, presiding.

The plaintiffs appeared by Messrs. Randall S. Jones, Plowden Stott, Nicholas Jaureguy, and Maurice D. Sussman, their attorneys; the defendant appeared by Messrs. Borden Wood and Robert S. Miller, its attorneys.

Thereupon proceedings were had as follows: [1*]

*Page numbering appearing at top of page of original Reporter's Transcript.

PROCEEDINGS:

The Court: You may proceed, Gentlemen. The pre-trial order is now in?

Mr. Wood: It has been signed, your Honor.

Mr. Jones: There was discovered for the first time this morning that I knew anything about—and I think it escaped the attention of everyone else—a letter that was written to the bank on May 16th, 1939 and we have their return receipt under date of May 17th, 1939. We claim no more for it at this time than that on that date we notified the bank in writing of the losses that we were claiming and made a tender at that time of all the checks that we knew about and had discovered, in the sum of \$5611.94. We don't care if it goes in evidence or not, but the main thing we want for the letter is that on May 16th, 1939 we did notify the bank of the alleged losses, and made a demand on them for the payment, so that they wouldn't claim that there were wrong charges against the account, and we offered to tender the checks back.

Mr. Wood: Defendant admits, your Honor, that under date of May 16th, 1939 C. L. Randall, Superintendent of Claims of the plaintiff American Surety Company, wrote a letter to the defendant making claim of alleged forged checks, stating that the checks would be presented to the bank in due course, notifying the bank of Mr. Randall's company's claim of our liability—the bank's liability—in the sum of \$5611.94. [2] That seems to

be the substance of it, we admit such letter was received by the defendant the following day, May 17th, 1939.

Mr. Jones: There is this additional, Mr. Wood, that we also notified the bank at that time that we mailed notices to prior endorsers of our claims.

Mr. Wood: The letter shows that the same letter was mailed to Meier & Frank Company, Lipman Wolfe & Company, Granning & Treece, Bernice Bowman, Jay Stine, and H. J. Guindon; a copy of the letter was mailed out to all those parties, and it is mentioned in the body of the letter that copies of the letter were sent to those parties I named. The defendant admits that.

The Court: The Court will not stop now to have this put in the pre-trial order, but you may make a clerical amendment to the pre-trial order. Are there any objections now to the pre-trial order as submitted?

Mr. Wood: Not on the part of the defendant, your Honor.

Mr. Jones: Plaintiffs are satisfied with it but in putting that in, if the Court wants it in, I think that Page 61½ would be a proper place to type in the admission just made.

The Court: The Court now signs and grants the pre-trial order with this amendment. You may now proceed.

(Opening statements were thereupon made to the Court by counsel for the respective par-

ties, after which proceedings were had [3]
as follows:)

Mr. Jones: I will call Mr. Johnson.

J. F. JOHNSON,

was thereupon produced as a witness in behalf of the plaintiffs herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Jones:

Q. Will you give your name in full?

A. John Frederick Johnson.

Q. What is your work, Mr. Johnson?

A. Auditor.

Q. How long have you been engaged in book-keeping and auditing?

A. Since about 1922.

Q. Who are you employed with now?

A. Price, Waterhouse & Company.

Q. How long have you been employed there?

A. Since 1931.

Q. Have you ever done any auditing work for Price, Waterhouse on the accounts and records of Balfour, Guthrie and Interior Warehouse Company? A. Yes.

Q. Did you make an audit there in May, 1939?

A. I assisted in making the audit, yes. [4]

Q. What is that?

A. I assisted in making an audit.

(Testimony of J. F. Johnson.)

Q. Had you ever assisted in making other audits there?

A. Yes, for Balfour, Guthrie & Company, Limited.

Q. Prior to that time? A. That is right.

Q. As you were making the audit in May of 1939 did you in doing that reconcile the bank account of the Interior Warehouse Company?

A. Yes, I reconciled the bank account for Interior Warehouse Company.

Q. In doing that did you find any irregularity or apparently an irregularity in any of the checks or the endorsements?

A. The only apparent irregularity was an address on a check which was payable to a laborer in Eastern Washington. The address on the back on the check was the Portland address of a friend of mine.

Q. And upon finding that what did you do?

A. I looked up some other checks which were payable to this same person.

Q. And did they have the same address on them?

A. No. The checks which I found which had been issued in a prior month had been cashed in Eastern Washington.

Q. Upon discovering that what did you do?

A. I called Mr. Rawlinson. [5]

Q. Who is Mr. Rawlinson?

A. He is the assistant manager of Price, Waterhouse & Company.

(Testimony of J. F. Johnson.)

Q. Was he assistant manager then?

A. Yes, I believe so.

Q. Then did you get any orders from Mr. Rawlinson at the time?

A. Yes, Mr. Rawlinson instructed me to investigate the paid checks in the company's possession for possible irregularity along the lines of that which I had apparently discovered.

Q. Did you do that then?

A. Yes, we did.

Q. And did you later report to Mr. Rawlinson?

A. Yes.

Q. Did he come down there?

A. Yes, Mr. Rawlinson came down.

Mr. Jones: Now if the Court please, I am going to have to recall this witness again, but from this point on there are a great many questions I will have to take up with Mr. Rawlinson, and I would like to have the witness step aside, because it will go in in much more logical and chronological order if Mr. Rawlinson is allowed to testify next.

Mr. Wood: No objection on the part of the defendant.

The Court: You reserve your cross-examination?

Mr. Wood: Yes.

(Witness withdrawn.) [6]

CHARLES E. RAWLINSON,

was thereupon produced as a witness in behalf of the plaintiffs herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Jones:

Q. I don't know whether they have got your full name in the record. If not, please state it.

A. Charles Ernest Rawlinson.

Q. Mr. Rawlinson, are you a certified public accountant? A. I am.

Q. How long have you been a certified public accountant? A. Since 1925.

Q. Who are you employed with?

A. Price, Waterhouse & Company.

Q. What is your position there at this time?

A. Assistant manager.

Q. How long have you been assistant manager?

A. Since 1934.

Q. Do you recall in May of 1939 receiving a telephone call from one of your associates there, Mr. Johnson? A. I do.

Q. Concerning some check irregularities at the Interior Warehouse Company? A. I do.

Q. What instructions did you give them upon the phone call? [7]

A. Well, I saw him at lunch time and went down early in the afternoon to look at the checks that he had there.

Q. After that——

(Testimony of Charles E. Rawlinson.)

A. (Interrupting): And after that I gave him instructions to get out the checks running back from that date over a period of time and select from those checks any which appeared to have endorsements where the writing to any extent corresponded with the writing on the three checks that he presented to me at that time.

Q. And did he later report to you that he had done that?

A. Well, he spent the evening doing that, and the next morning I went directly to the offices of Balfour, Guthrie and saw them.

Q. And after you had seen them what did you do? A. I talked to Mr. Crowe.

Mr. Jones: I should like to have Pre-Trial Exhibit No. 3. You may give it to the witness. If the Court please, the pre-trial order says that this Pre-Trial Exhibit No. 3, an audit of Price, Waterhouse & Company, is admitted by the defendant to be the original of such an audit without further identification, so I am offering it as evidence at this time.

Mr. Wood: The pre-trial order also says, "Subject, however, to any and all legal objections to any statement, matter or thing therein contained wherein the same is or are not supported at the trial by bank statements, original documents or [8] legally admissible testimony to be produced or supplied by plaintiffs." In this document, your Honor, you will note there are statements covering im-

(Testimony of Charles E. Rawlinson.)

proper disbursements. "We are informed by Crowe. We are told by Crowe." Attached as exhibits are calculations made by Crowe, the last four pages of allegedly false checks where allegedly the names of payees had been forged. As to so much of this audit as is a summarization of the books and records, a rule of convenience with which your Honor is quite familiar, we have no objection. As to those portions which refer to defalcations or forgeries, unless the witness knows of his own knowledge, we object on the ground of hearsay, we object on the ground of incompetency, irrelevancy, and immateriality.

Mr. Jones: If I may ask a few questions, your Honor.

Q. Mr. Rawlinson, you were up here yesterday afternoon with Mr. Stott, Mr. Jaureguy, and myself? A. I was.

Q. Looking over these exhibits that are over on the other side of the court room there?

A. I did.

Q. Now then, the various documents and records and bank statements, and so forth, to which you refer in your audit, are they in the court room at this time?

A. It appears that they are. A volume of them, a number of them—I couldn't say directly, but from the things that I [9] looked at, they are the type of things we looked at and to a large extent the same things we looked at. There may have been others more or less.

(Testimony of Charles E. Rawlinson.)

Q. There is mention made in the pre-trial order at the bottom of Page 6 of 19 checks of which the originals were destroyed. Yesterday afternoon were you here when we were checking through the records to find if the carbon copies of those checks and the payrolls having to do with them, and so forth, and the documents and records upon which your audit concerning them is based, were here? A. I was.

Q. And are they here?

A. They appear to be.

Q. Well, do you know—Yes or No—whether those records are here or not?

A. Well, if they haven't been moved. Yesterday the very items, those that I looked at, were on the desk.

Q. We turned them back to the clerk when we left and the clerk took charge of them. Were you here then?

A. I think I had gone a few minutes before.

Q. Except for the statements which may have been made by Mr. Crowe to you orally—and maybe they are mentioned in the audit—except for any oral statements that he has made or anything like that they are here? Is that right?

A. May I have the exhibit, please? I believe the lists that [10] were made by Crowe have been placed in evidence as one of the exhibits that is included as Exhibit B here.

(Testimony of Charles E. Rawlinson.)

Mr. Jones: May I have Exhibits 4, 5, and 6? Please show Pre-Trial Exhibits 4, 5, and 6 to the witness.

The Witness: These exhibits appear to have been taken out of our working papers and placed in the record here.

Q. Are Exhibits 4, 5, and 6 the statements of Mr. Crowe which you refer to in your audit?

A. Yes, we copied these as Exhibit B into our report.

Mr. Jones: Now will you hand me Exhibit 2? I am handing the witness Exhibits 1 and 2. Mr. Rawlinson, will you open Exhibit No. 1 and identify it? I may say, the pre-trial order at this point says without qualification that Exhibit No. 1 is 107 original checks drawn on the defendant, dated October 2, 1935 to April 21, 1938, and which may be admitted without further identification.

Mr. Wood: The date is April 21, 1939. I have no objection to the introduction of these checks in evidence.

The Court: They are now admitted. The marking under these circumstances may take place later.

(A bundle of canceled checks, heretofore marked Plaintiffs' Pre-Trial Exhibit 1, was thereupon received in evidence.)

DATE Sept. 8, 1938

CASHIER: Interior Warehouse Company
TO THE BANK OF CALIFORNIA
NATIONAL ASSOCIATION
24-6 PORTLAND, OREGON

No 3536

PORTLAND, OREGON

24-6 PORTLAND, OREGON

PAY TO THE ORDER OF C. W. CLARK \$46.78 DOLLARS \$46.78

46 78 CTS

TO THE ORDER OF C. W. CLARK

Interior Warehouse Company

PAY CHECK

Handwritten signature

UNIVERSAL BANK & TRUST CO., PORTLAND, OREGON, HAS FACSIMILE INSTRUMENT FORM 11222

REG. U.S. PAT. OFF.

Handwritten note

PAY TO THE ORDER OF
ANY BANK, BANKER OR TRUST CO.
SEP 10 1938
BY DEPOSIT TO THE ACCOUNT OF
Meier & Frank Co.
PORTLAND, OREGON

PAY ONLY THROUGH
CLEARING HOUSE
SEP 12 1938
FIRST NATIONAL BANK
4 PORTLAND OREGON 4

DATE Jan. 27th, 1939 **Interior Warehouse Company** No. **4339**

TO **THE BANK OF CALIFORNIA** PORTLAND, OREGON

CASH NATIONAL ASSOCIATION
24 PORTLAND, OREGON

PAY THIRTY TWO DOLLARS AND SEVENTY FIVE CENTS DOLLARS \$ 42.75

TO THE ORDER OF **W. B. FARTHING**

Interior Warehouse Company

By *[Signature]*

PAY CHECK

CHARLES HARTLEY CO. PATENTED FEB. 10, 1936. FOR THE UNITED STATES OF AMERICA. FORM 1512W SPEC. REG. U. S. PAT. OFF.

W.B. Hartley
W.B. Hartley
RECEIVED JAN 30 1939
FOR DEPOSIT ONLY
THE BANK OF CALIFORNIA
PORTLAND, OREGON

119

DATE April 3, 1968 ASHELD

21

THE BANK OF CALIFORNIA

NATIONAL ASSOCIATION

PORTLAND, OREGON

Interfigr. Warehouse Company № 4996

POLYLAND, ORICON

FAY

DOLLARS \$99.00

TO THE
ORDER
OF
C. C. ELLEDGE

Interior Warehouse Company

W. A. Jensen

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U.S. PAT. OFF.

100

M. N. Kearney

PAY TO THE ORDER OF
 ANY BANK, BANKER OR TRUST CO.
 9 APR - 4 1939
 FOR DEPOSIT TO THE ACCOUNT OF
Wm. J. Banker
 PORTLAND, OREGON

PAY ONLY THROUGH
 CLEARING HOUSE
 62-5136
 FIRST NATIONAL BANK
 PORTLAND, OREGON



DATE March 3rd, 1939

TO
THE BANK OF CALIFORNIA
NATIONAL ASSOCIATION
244 - PORTLAND, OREGON

Cashier Interior Warehouse Company
PORTLAND, OREGON

PORTLAND, OREGON
MAR - 9 1939
4726
UNITED STATES NATIONAL

PAY

THIRTY TWO DOLLARS AND 50 CENTS
\$32.50

TO THE ORDER OF
DICK SPERRY

Interior Warehouse Company

PAY CHECK

CASHIER'S BANKER CO., REGISTERED, AND BANKERS AND FINANCIALS, NEW YORK, CHICAGO, PHOENIX, ST. LOUIS, ST. PAUL, MINN.

AM. U.S. PAY. OFF.

W. W. Sperry

Dick Sperry
PAY TO THE ORDER OF
BANK. BANKER JR TRUST CO
MAR - 8 1939
FOR DEPOSIT TO THE ACCOUNT OF
Meier & Frank Co.
PORTLAND, OREGON

PORTLAND, OREGON
MAR - 9 1939
THROUGH CLEANSING HOUSE

32.50

(Testimony of Charles E. Rawlinson.)

Mr. Jones: Refer, please, to Pre-Trial Exhibit No. 2. I have here, if the Court please, a packet of checks and drafts [11] that were called for by Mr. Wood and demanded by Mr. Wood as an exhibit, and at the time these had been removed from the bank statements we had forgotten that they were all contained in a separate little envelope, because they are originals—or they are the genuine copies of payments which were validly made to the people represented there, and Exhibit No. 2 are carbon copies of duplicates of those payments. These should have been in the bank statements which you called for and that are one of those boxes. We found them this morning as having been taken out to show to the bank, and they never were put back. Those include the genuine payments to the people that are mentioned in the 19 checks, and make the 19 check duplicates of these (indicating). You see, they were all duplicate payments.

Mr. Wood: I understand that, but these 19 original checks are still missing?

Mr. Jones: They are still missing.

Mr. Wood: And this is a carbon?

Mr. Jones: Yes.

Mr. Wood: A carbon only of the face and not the back?

Mr. Jones: That is right.

Mr. Wood: What is the purpose of these?

Mr. Jones: You called for the bank statements, and these should be with them.

(Testimony of Charles E. Rawlinson.)

Mr. Wood: It is all right with me for them to go into the [12] box.

Mr. Jones: Well, we are going to use them now. We would have had to take them out of there if they were in there. I should also like to submit a packet of drafts and checks that belong with Defendant's Pre-Trial Exhibit No. 24.

The Court: Let's have that marked in some way so we can tell what those are.

Mr. Jones: Would they be marked 24-A?

Mr. Wood: It doesn't make any difference to me.

The Court: All right, 24-A.

(A bundle of canceled checks was thereupon received in evidence and marked Plaintiffs' Exhibit 24-A.)

Q. (By Mr. Jones): Now in connection with Pre-Trial Exhibit 2 please consider Pre-Trial Exhibit 24-A. Can you tell me, Mr. Rawlinson, if you have upon Exhibit No. 2 the checks listed on the bottom of Pre-Trial Order No. 6? I think the best way is to have a copy of that pre-trial order handed to you. Would you hand him a copy of the pre-trial order?

A. Check No. 4016 is the first item listed on this.

Q. Now to shorten this up for the present purposes, were you here last night when all of those check numbers except B-15566 were identified on Pre-Trial Exhibit No. 2? A. Yes.

(Testimony of Charles E. Rawlinson.)

Q. Now then, look in at that pack of checks, 24-A, and see if you can find a check No. 15669. [13]

A. That is not in this batch that you just gave me.

Q. How is that?

A. That is not in this 24-A.

Q. In 24-A there should be a B-15669. I tell you that just to speed this up. You may look for that check at the noon hour, but except for this one check for \$43.20, both the genuine payment and the duplicate——

A. (Interrupting): The genuines are supposed to be in this group here (indicating).

Q. But the carbon copies of both the genuine and the other were picked out last night except for this one? A. Yes.

Q. Did you see the country payrolls and the dock payrolls here in the court? Are they still here? A. Yes.

Q. You may now answer whether all the documents mentioned in your audit are here.

A. To answer that directly I would have to check all the documents. For all practical purposes I would say the type of documents and the number of them—those that I saw were the documents you had. There may be other documents that you had of the same nature, but when you see a stack of payrolls that big (indicating) I am not prepared to say they are all exactly the same payrolls.

(Testimony of Charles E. Rawlinson.)

Q. To your best judgment they are all here, and they are all [14] supposed to be here? Is that right? A. Yes.

Q. Now, in making this audit, your Exhibit No. 3, the documents and so forth mentioned in there were all before you at the time, you or your assistants? A. Pardon?

Q. You had access to all those documents and were using them?

A. All these documents that you have here were all available and used by us in compiling this report.

Mr. Jones: If Mr. Wood wishes at this point to have a recess I will have Mr. Rawlinson go over everything but one of those things for the purpose of satisfying him, if he is not satisfied with the apparent showing that we have made up to this point.

Mr. Wood: I don't ask anything of that kind, your Honor. I do ask the privilege of enlarging upon the objection that I made to include the specific objection to the audit as far as bears upon the 19 missing checks, on the ground that they haven't yet shown that the originals are missing, therefore they haven't shown why they cannot produce the best evidence. The carbon copies of the 19 missing checks are not the best evidence, and are incompetent, irrelevant, and immaterial, on the ground that they are not full copies and purport to be copies of the face; they do not show the reverse in the

(Testimony of Charles E. Rawlinson.)

nature of endorsements. They haven't even yet shown that they are destroyed, so I am [15] enlarging the objection I previously made to the admission of this audit except that the audit is a summarization of what these people found themselves, and not the purported confession of Mr. Crowe.

Mr. Jones: May I ask, is your concern primarily interested as to the 19 missing checks?

Mr. Wood: No. Anything disclosed by their own audits is all right. It is pure hearsay as to what Crowe told them.

Q. (By Mr. Jones): Mr. Rawlinson, at the time you made the audit was a search made for the 19 checks? A. There was.

Q. Were you able to find the 19 checks?

A. We were not.

Q. Did the auditors and employees of the Interior Warehouse Company help you in that search?

A. They were the ones that did the searching, because the only transactions that presented any material difficulty were the transactions involving the missing checks, therefore a great deal of that time would be expended in trying to avoid unnecessary work.

Mr. Jones: Will the bailiff please hand to Mr. Rawlinson Exhibits 4, 5, and 6?

Q. Mr. Rawlinson, were they able to find and give you the originals of the 19 checks listed in the pre-trial order? A. They were not. [16]

Q. This work of making this audit was all under your own direction?

(Testimony of Charles E. Rawlinson.)

A. The direct work was under my direct instructions. Naturally Mr. McIntosh reviewed it and discussed the matter with me. Mr. McIntosh is the principal of the firm in Portland.

Q. But immediately were you——

A. (Interrupting): I was immediately in charge of this work.

Q. And the working sheets, and so forth, have been in your control since?

A. They have been in the office files.

Q. Now the 107 checks that are there in that first packet, Exhibit 1, how did you go about identifying those as forged endorsements?

A. Well, we aren't qualified to say whether it is a forged endorsement or not. That is why we used the language to which Mr. Wood took exception; that is why we used the term "improper withdrawals and irregular transactions." We are not handwriting experts, and although to a reasonable man spreading a group of these checks out and a group of the checks—we will call them authentic checks——

The Court (Interrupting): Just a moment. I think that testimony isn't admissible, as to what a reasonable man would think.

The Witness: Well, spreading out a group of these checks which appeared not to be authentic and spreading out a group [17] of checks from the same named employees which were authentic checks——

Mr. Wood (Interrupting): Just a moment. I object. May I ask a question?

(Testimony of Charles E. Rawlinson.)

The Court: No, I think you will have to object.

Mr. Wood: On the ground that that testimony is incompetent, irrelevant, and immaterial. This witness is not in position to say which is the authentic check. When checking back on other checks which he says are authentic he doesn't know whether those checks were forged or the other checks were forged.

The Court: The objection is sustained. My idea about this is that the witness is trying to testify about what the Court is going to have to find.

Q. (By Mr. Jones): Mr. Rawlinson, now the checks that had been paid were back from the bank and had been reconciled and were generally accepted by the company as proper and authentic checks. Did you have such checks before you?

A. At the time we were reviewing this problem?

Q. Yes.

A. We did.

Q. And then you compared those 107 checks and their endorsements with corresponding endorsements on the checks that were generally accepted by the company as proper?

Mr. Wood: That is the same question in another form, your Honor. I object to it on the same ground. [18]

The Court: No, he may testify whether he compared them or not.

Q. (By Mr. Jones): Did you make such a comparison? A. We did.

(Testimony of Charles E. Rawlinson.)

Q. Did you find anything on these 107 checks in that Exhibit 1 there that had any differences or apparent irregularities that you could single out?

A. There was a similarity in writing between a number of different endorsements. For instance, Joe Green, Roy Lamb, R. W. Umbarger—the writing of those checks had a similarity and the writing on other checks made out to these same individuals did not have a similarity.

Mr. Wood: I move to strike that, your Honor, because he said he is not a handwriting expert.

The Court: And furthermore there is no identification of what he is talking about. The answer is stricken.

Q. (By Mr. Jones): Now, then, did you go to the payrolls with these checks and check them against the payrolls?

A. The authentic ones or the ones that were not supposed to be authentic?

Q. These 107 checks, Exhibit No. 1.

A. Did we check them actually with the payrolls?

Q. Yes, did you find a man's name on the payroll to correspond with it?

A. We did. There might be exceptions where the names would [19] be there but the men might have been changed from one column to another.

Q. Did you find that the same men had been paid for the same period of time on other payrolls close to them? A. We did.

(Testimony of Charles E. Rawlinson.)

Q. Did you find authentic checks for the payments to the man at that time? A. We did.

Q. What general method of accomplishing this duplication did you find?

The Court: Now, just a moment, Mr. Jones. I want to determine in my own mind; is that applying to the 19 or applying to the whole 107?

Mr. Jones: I think the whole 126. The question will apply equally to all 126, but I am directing it only to the 107. I am talking now about the 107 checks that he has there.

The Court: Well, you used the word "duplication." I didn't know there was any duplication as to the 107. I thought that was as to the 19.

Q. (By Mr. Jones): Will you explain that point?

A. There was duplication. On Exhibit A of your Pre-Trial Exhibit No. 3 we listed the various types of transactions. The first grouping was checks negotiated in Portland which had been made payable to names inserted on the dock payroll, such names not appearing on the carbon copy of the payroll [20] retained at the dock office where the payroll had been prepared. That is one group of transactions. The second group is checks negotiated in Portland which had been written payable to employees listed on the dock payroll, such employees actually having been paid by other checks or in cash. The endorsements on the checks listed do not correspond with the signatures of the employees. The

(Testimony of Charles E. Rawlinson.)

third group, checks negotiated in Portland which had been written payable to country employees who were actually paid by other checks drawn in Portland. Six exceptions noted. I might say at this time that each of these groups is supported by a detailed itemized list.

Mr. Wood: I renew my objection, not only to the audit itself but that very testimony read out of the audit. He is just reading from the audit.

The Witness: Well, do you object to saying "checks negotiated in Portland"?

The Court: Just a minute now; you are the witness. I will strike that portion that relates to the signatures not being the same. That is a determination that the Court will have to make.

Q. (By Mr. Jones): Now, without passing judgment upon the differences that you found, go ahead and explain the other two groupings and what points you observed there, but don't pass judgment on it like you did in this last one. [21]

A. Checks negotiated in Portland which had been written payable to country employees who were actually paid by drafts issued by country agents. Two exceptions noted. Amounts charged by the bank on the company's bank statements showing payments where paid checks as evidence thereof are not available, possibly destroyed, and company's carbon copies of the numbered checks indicate, one, that the items were in payment for services which were paid for by other checks or

(Testimony of Charles E. Rawlinson.)

drafts, and two, that the checks had been voided after their preparation.

Q. Now, Mr. Rawlinson, when you got all through with your work and finished that report verifying your work, your conclusions that are expressed in there, from all information that was available to you at the time was the total amount that you believe were the checks that were wrongfully charged?

Mr. Wood: I object to that as calling for a conclusion of the witness as to whether they were properly drawn or improperly drawn, and as being incompetent, irrelevant, and immaterial, and I object to that further portion read from his audit in the record.

Mr. Jones: We don't need it. We can add them up on an adding machine. It is just to save time.

Mr. Wood: Mr. Jones, I am perfectly willing to take the total of the 126 checks or the 19. I have no objection to that.

Q. (By Mr. Jones): Do you want to tell the total of all 126 [22] checks, and then separately the total of the 19 checks?

A. \$6562.33 is the total of the 126 checks; \$950.39 is the total of the 19 checks.

Q. Mr. Rawlinson, after you had started in on this I suppose you talked to the officers of the Interior Warehouse Company and Balfour, Guthrie about what you were finding.

A. Oh, yes, prior to actually commencing this

(Testimony of Charles E. Rawlinson.)

work I discussed the matter with Mr. MacGregor and received his instructions to make this examination.

Q. Their chief accounting officer down there is who?
A. Mr. Lawson.

Q. Did you talk the matter over with him?

A. I did.

Q. Did you also talk with Mr. Crowe as you went along with this work?

A. He was available. It helped, having him available. It would have made no difference to the results, of course.

Q. But he was there, was he?

A. He was there part of the time, or he was on call. He wasn't there for days on end, but if we needed him he made himself available.

Q. And did you or your assistants or under your direction—were all of these checks that you are of the opinion were not properly drawn, were they talked of and discussed with him?

A. They were. [23]

Mr. Wood: I object to that as calling for a conclusion of the witness, whether they were properly drawn or not.

The Court: No, I don't think falls under opinion. It is just a question whether he talked to him about it. He may answer.

Q. (By Mr. Jones): I just want to know if you discussed it with him.

A. They were discussed.

(Testimony of Charles E. Rawlinson.)

Q. Did you discuss those things with Mr. Crowe?

A. We did.

Q. Are the conclusions that you have in that report, your audit, supported by documentary evidence?

A. As regards the 19 checks it is the type of evidence which accountants would accept and consider, but whether that could be termed documentary evidence is a matter on which I wouldn't say.

Q. Well, you have got that Exhibit No. 2 there, haven't you?

A. Yes, that is part of the evidence upon which we relied.

Q. Now, the statements that you have got there—the conclusions you have made, I mean to say—are they supported by the documentary evidence we are referring to? A. They are.

Q. Would your conclusions have been the same without having Mr. Crowe available for conversation? A. They would. [24]

Q. Could you have arrived at the same results without him as with him? A. We could.

Mr. Jones: There are two men here that I don't want to have to call back this afternoon. I have just got about two questions apiece. They were the two signing officers of the warehouse company, and I would like if I could to ask them two questions apiece so they won't have to come back. May I?

The Court: Well, I don't want to break into this. Go ahead, and call the witness when you get to him.

(Testimony of Charles E. Rawlinson.)

I am only interested in the order of proof; I am not interested in what witnesses have to be called.

Mr. Jones: You may cross-examine.

Mr. Wood: Mr. Jones, do I understand that the only exhibit which was admitted was No. 1, the 107 checks that you offered, or did you offer only the audit?

Mr. Jones: I have brought the audit but I am not insisting on that offer at the present time. I am going to follow it up with some more evidence.

Cross-Examination

By Mr. Wood:

Q. Mr. Rawlinson, isn't it a fact that all of the material that you have in this audit was obtained by reason of talking to Crowe?

A. It was not. [25]

Q. How could you have compiled this audit without his assistance in pointing out these alleged defalcations to you?

A. As far as the checks were concerned, they were sorted out without Crowe's assistance and shown to him afterwards.

Q. But wasn't it he that mentioned specific checks that he might have claimed were improper in some respects?

A. That he mentioned any specific check?

Q. Yes, didn't Crowe do that?

A. I don't know the number, but probably out of the 107 checks 105, or over 100 of them, were

(Testimony of Charles E. Rawlinson.)

obtained before we had an opportunity—or took an opportunity to talk to Mr. Crowe.

Q. And yet it was Crowe's alleged confession that started you on this special work, wasn't it?

A. Naturally the first thing to do when you have something like that is to discuss it with the man in question. I discussed it with him.

Q. You wouldn't have started in this special work of this audit except for what Crowe had told you?

A. We already had the evidence in our hands to go ahead with that work. If he had walked out of the office that night and never was seen since it wouldn't have made any difference. It would have been a little more expensive to follow the missing checks, but where there were two checks, as far as those particular checks are concerned it wouldn't have made any [26] difference.

Q. Well, if you could have done it without Crowe's assistance in '39 why couldn't you have done it in '38, '37, and '36?

A. This similarity of names and what not was observed in 1939 because a group of checks happened to come showing approximately the same writing.

Q. And that didn't occur in '38, '7, and '6?

A. No.

Q. In those years did you reconcile checks against payrolls and the timebook?

A. We did.

(Testimony of Charles E. Rawlinson.)

Q. Isn't it a fact that Crowe didn't add any names to the timebook?

A. No, it is not a fact. He did.

Q. He did add some names?

A. I think there was only one or two names added to the time book. Are you referring to the dock payrolls?

Q. No, I am referring to the superintendent's timebook.

A. He did add names. In the exhibit, Schedule 1, you will observe in there that the name C. W. Clark—there were two names really used, Clark and Carey. The same name was apparently used, and inserted.

Q. Did you make that check each year that you made this audit—check the checks back against the payrolls?

A. We did. The names were on the payrolls and they were in the [27] dock time book.

Q. Well, that was true of these 107 checks too? The names did appear in there too, didn't they?

A. You are dealing with two groups; one, the dock payroll, and the other, the country payroll.

Q. Such portion of the 107 as relate to the dock, those names appeared on the dock payroll, didn't they?

A. They did on the office copy, the copy that came up to the office.

Q. That was in '39? A. Yes.

Q. And the same thing obtained in '38?

(Testimony of Charles E. Rawlinson.)

A. It did.

Q. In '37? A. It did.

Q. '36? A. It did.

Q. What was the difference in '39, '38, '7, and '6? If the signatures were all checked back each year why was there any such irregularity in '39? Why didn't you pick it up in a prior year?

A. When one check or a group of checks comes to your attention you scrutinize the endorsements. If there is an endorsement on the back we assume that that endorsement has been checked by the bank. [28]

Q. It is not part of the audit to check that?

A. Purely to check that there is an endorsement. Whether it is a good endorsement or a bad endorsement is beyond our work.

Q. When did you make your audits each year? They were annual audits each year, weren't they?

A. The examination of Balfour, Guthrie and its subsidiaries, which includes Interior Warehouse Company, is conducted annually, about March 31st.

Q. Which month?

A. At March 31st. The work is done between March and June 30th.

Q. After September 1, 1935—that is the date of the first alleged defalcation—you would have an audit for March 31 in '36, March 31 in '37, and in '38; is that it?

A. We did. Are you attempting to discuss the scope of the audit?

(Testimony of Charles E. Rawlinson.)

Q. Well, was it the same audit as in '39?

A. Not the same type of work that we do in an investigation of this nature.

Q. These alleged defalcations were going on in those years? A. They were.

Q. And you made the same check that you did in '39 in those prior years? A. We did.

Q. And you never discovered it? [29]

A. No.

Q. Did you at any time during those years advise the Interior to change its bookkeeping system in any respect?

A. To change their accounting procedures?

Q. Yes.

A. It quite often occurs at the end of the audit that we write a letter making certain suggestions for certain changes.

Q. This system of the Interior is about a forty-year old system, isn't it?

A. The system as a whole?

Q. Yes. A. No.

Q. It is a pretty old system, isn't it?

A. There were certain material changes made in 1933 or so, but insofar as the payrolls were concerned I don't think there was any change. It wasn't necessary.

Q. You knew all during these years that you were making these audits that Crowe drew these checks, didn't you? A. We did.

Q. He was payroll clerk?

(Testimony of Charles E. Rawlinson.)

A. Well, he was general bookkeeper for Interior, and one of those duties included the preparation of these checks—or under his direction.

Q. He worked for Balfour, Guthrie also, didn't he?

A. He did a certain amount of work for them.

[30]

Q. And you knew he was drawing these checks?

A. He was.

Q. All during this period? A. Yes.

Q. And you knew he was taking them to just one officer of the Interior for signing?

A. One or two or three, perhaps.

Q. Well, only one signature would appear?

A. The individual checks were going to only one officer.

Q. You knew during the course of those years that those checks after they were signed by the officer were redelivered to Crowe?

A. That wouldn't be to my own knowledge.

Q. Had you been so informed?

A. Pardon?

Q. In the course of making these audits had you been informed that that was the procedure?

The Court: Just a minute. If you are going into that phase of it I am going to open it up on the other side. If you are going to rely in cross-examination on the hearsay side of this thing then I am going to permit the other side to go into it.

Mr. Wood: I think that is correct, your Honor.

(Testimony of Charles E. Rawlinson.)

I thought that might be in the nature of an admission, but I will withdraw it. [31]

Q. Did you during the course of these years I have mentioned at any time advise these people to put another man on with Crowe so as to afford a system of checks and balances against him?

A. As regards the accounting for Interior Warehouse itself?

Q. Yes.

A. The general accounting for Interior Warehouse was not sufficient to warrant a division of the ordinary duties there, but we had advised and suggested that somebody else reconcile the bank accounts.

Q. Crowe was reconciling the bank accounts all these years, wasn't he?

A. Well, our observation led us to believe in the month that we checked that he had reconciled the bank account.

Q. And you made that recommendation to the Interior? A. We had done it.

Q. About what year did you do that? On which audit?

A. Sometimes those recommendations are verbal and sometimes they are in writing. This particular point I believe was put in writing in 1938.

Q. That was not done, was it, until after Crowe left the employ of the Interior?

A. You will have to ask them that question.

Q. Do you know of your own knowledge that as soon as Crowe was discharged they immediately

(Testimony of Charles E. Rawlinson.)

put two men on that system so that [32] one could check the other?

Mr. Jones: If the Court please, I think that is irrelevant and immaterial.

The Court: Yes, the basis on which you are examining him now seems to be on theory of negligence, and the subsequent act to take care of negligence that has happened previously is never competent.

Mr. Wood: I think this is directed more to our defense anyhow, your Honor. I withdraw that question.

Q. You say in making these audits you would check against the payroll and you found the amounts different sometimes on the payroll as against the checks?

A. Are you talking about this examination now?

Q. At any time did you find that? Did you find it before '39?

A. No.

Q. Just in '39 you found that? Is that right?

A. Yes.

Q. And on previous audits you never found any discrepancies between canceled checks and the names on the payrolls and the amounts after the names?

A. No. The examination of Interior Warehouse Company is quite a limited examination as a subsidiary of a large group of companies. It merely comes in for such check as is necessary. You have to consider the substantial accuracy of the accounts

(Testimony of Charles E. Rawlinson.)

as a whole. The items in here, as you will observe, are all [33] small items, and in a subsidiary like this items below a certain amount very often don't come under our scrutiny, that is, as regards the general entries in the books. If you are checking a payroll you naturally check the individual checks—or a bank account.

Q. In auditing in '36, '37, and '38 did you find any duplicate checks issued to a single laborer?

A. No, we didn't observe any within the periods that were checked by us.

Q. Preparatory to your audits of those years did you make such a check?

A. I believe in that period we reconciled the bank account for one month.

Q. That is what you call a test check, isn't it?

A. Yes, and within that period, a very good example of that, Clarkson's name might have been in that period. Well, he wouldn't be a duplication; he would be an insertion on the payroll. That is Exhibit Schedule 1.

Q. Did you go back any of those years and check against the original time kept by the dock superintendent, the timebook?

A. We did for the month that was test checked by us. We checked the payroll of one month and we checked back from the copy of the payroll in the office back against—test checked the details in the timebook for the number of hours of the individual employees working. They don't use the time card system. [34]

(Testimony of Charles E. Rawlinson.)

Q. Did you complete your answer? I didn't mean to interrupt you.

A. I say, they don't use a time card system; they use this book that you refer to as the time book, which is maintained by the dock superintendent.

Q. Can you tell us which month you made that check in? A. Each given year?

Q. Yes.

A. I wouldn't be prepared to say offhand without going back through the papers.

Q. It would be just one month out of the twelve?

A. Yes.

Q. And that check would include a check against the book that the superintendent kept?

A. It would.

Q. And against the payroll sheet that came to the office? A. Yes.

Q. Both country and dock?

A. The country wouldn't have those.

Q. The country wouldn't have payroll sheets?

A. No, they wouldn't have a time book. The country payrolls are usually from one to three employees on each, and they don't have that.

Q. Distinguishing the time book such as the one kept by the superintendent on the dock from the payroll sheets themselves, [35] both the dock and the country warehouses furnished the originals of those payroll sheets to the head office here, didn't they? A. Yes.

(Testimony of Charles E. Rawlinson.)

Q. And you checked against those?

A. Yes.

Q. But in each instance a carbon of those payroll sheets was retained in the country or on the dock, as the case may be? A. It was.

Q. Did you inspect the carbons? A. No.

Q. You don't know whether any alterations appeared on the carbons or not? A. Erasures?

Q. Any alterations appearing on the carbons of the payroll sheets.

A. No. Oh, since the examination we have made that comparison of this Clarkson, and so on, and so forth, on Schedule 1. Those items do not appear on the dock copy of the payroll.

Q. So you know now from examination that you have made since that there were no changes or alterations made on the carbons of the payroll sheets? Is that correct?

A. Well, I wouldn't be prepared to say whether there were or there weren't.

Q. Did you ever check the original payroll sheets back with [36] the carbons of the payroll sheets?

A. Did we?

Q. Yes, at any time.

A. You mean as part of our orderly procedure, or in connection with the examination?

Q. At that time, or subsequent, or at any time at all?

A. We did in connection with this examination, and we found that this list of checks was not on the dock copy of the payroll.

(Testimony of Charles E. Rawlinson.)

Q. And not on the carbon copy? A. No.

Q. And in the case of the country warehouses, not on the carbon retained by the country warehouse?

A. Well, the country situation is a little different. Some of those country payrolls were made up by somebody other than the country agent in such writing that you couldn't tell the difference.

Q. Then take the dock payrolls. These changes that you speak of that appeared on the originals were not carried forward on the carbon?

A. No.

Q. And you didn't call for the carbons at any time during your audit?

A. No. We called for the time book, the original record from which the payroll was made up, and the names had been inserted [37] in the book.

Q. You don't know of your own knowledge who made those insertions, do you? A. No.

Q. They could have been made by the dock superintendent himself, could they not?

A. It is possible.

Q. As far as your own knowledge on that score would extend, they might have been actual laborers who put in time represented by the name and the time that appeared there?

A. They might, although the conclusion doesn't appear very sound. If the dock superintendent were going to change that he would change his carbon copy of the payroll. That is his fundamental, at

(Testimony of Charles E. Rawlinson.)

least his basic record, is the carbon copy of the payroll, of which he sends the original up to the office.

Q. That would be the normal procedure?

A. Yes, and if he were going to change anything he would change his copy.

Q. In accounting practice is it considered proper and good accounting in making these audits to check back against those original timebooks and those original time sheets?

Mr. Jones: Just a minute; I object to that, your Honor, as calling for the conclusion of the witness and not within the scope of the direct examination and defendant's case on negligence as made in his answer. [38]

The Court: Objection sustained.

Q. (By Mr. Wood): Did you notice in making any of these audits a large number of checks which were voided in the checkbook?

A. There weren't a large number of checks that were voided. Every company has some checks that were voided. Sometimes it is carelessness on the part of employees; sometimes they destroy them and sometimes they retain them. Some companies retain them and some companies don't.

Q. Weren't there quite a number in this case, Mr. Rawlinson?

A. I wouldn't say that there was an abnormal number. The number of checks voided that way depends quite often on the carelessness or the efficiency of a girl making out payrolls. If you have

(Testimony of Charles E. Rawlinson.)

got a new girl on a payroll she will ruin more checks than a girl who had been on the job for years.

Q. Was there a girl on the payroll under Crowe's direction, or did he type all those?

A. I couldn't say that myself.

Q. Did you check those void checks against the bank statement? Would that give you any information on your audit?

A. Check the void check against the bank statement?

Q. Or against the payroll itself? Did you check the void check against the payroll itself? Would that give you any information on your audit?

A. The check wouldn't be there, and somebody would say the check was voided, and that would be the end of it. [39]

Q. Would it show whether it was a large number or a small number?

A. There was no particular suspicion aroused by having a check marked void.

Q. No, but the number you did find in here——

A. (Interrupting): I say, in this particular case the number of voided checks in this company never struck me as being out of the way.

Q. Well, in any of those cases of void checks would the payroll sheet show that the employee had been paid another or a different check?

A. No such particular instance came to our attention in the particular periods that were test checked by us.

(Testimony of Charles E. Rawlinson.)

Q. How about the very same check itself, a voided check? Would the payroll show that the man had been paid and the check not actually voided?

A. Well, all I can say to that is, as far as we were concerned in the period of our test checks we never happened to run into it.

Q. Were the voided checks themselves put back into the book or just voided on the stub?

A. I don't know with this particular company. I wouldn't be prepared to say whether they do or don't. Some companies do and some don't.

Q. Were there any other records or registers against which you [40] could check the payroll sheets, other than the dock payrolls?

A. The carbon copies of the checks that we are talking about.

Q. There would be no separate register?

A. No.

Mr. Wood: That is all.

Mr. Jones: No further examination.

(Witness excused.)

The Court: If you desire now, Mr. Jones, you may call these witnesses.

Mr. Jones: Yes, I would like to.

Mr. Wood: If your Honor please, I can make a statement that may save everybody's time. Both of these men are under subpoena by the defense, and they will be here.

Mr. Jones: Well, I only have a question or two

apiece, and you wouldn't need to bring them back until you wanted to call them.

Mr. Wood: That may save them some time.

Mr. Jones: Mr. Chrystall. [41]

A. M. CHRYSTALL

was thereupon produced as a witness in behalf of the plaintiffs herein, and having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Jones:

Q. Mr. Chrystall, will you state your full name into the record? A. A. M. Chrystall.

Q. What is your position, Mr. Chrystall?

A. In charge of the grain and the country end of it.

Q. For Balfour, Guthrie? A. Yes.

Q. Now this Interior Warehouse Company which is a subsidiary of Balfour, Guthrie, what is its chief purpose and function? Why do you have it?

A. We buy all our grain through it in the country.

Q. In 1935 to 1939 were you in the same position that you have now?

A. No, not quite. I have another position in addition to that.

Q. Well, as far as the Interior Warehouse Company is concerned is your position the same?

(Testimony of A. M. Chrystall.)

A. Yes.

Q. And during those years did you have authority to sign checks? A. Yes.

Q. Now who in principal signed the Interior Warehouse Company [42] payroll checks—in general? You and who else?

A. Myself and Mr. Lawson.

Q. Mr. Crowe as bookkeeper for the Interior Warehouse Company, after he had had checks prepared, would come to either of you people for signature? A. Yes.

Q. When he came in to get your signature on the check what did he bring with him besides the checks? A. He brought the payroll.

Q. Or a bill, or some supporting document of some kind? A. Yes.

Q. When he would bring these in would it be with a request that you sign, or how would that transaction take place?

A. He brought down these checks for the purpose of being signed, and naturally the payroll was signed by the dock superintendent or the country agent, the extensions were all checked, and I signed the checks.

Q. Now when you signed a check that he would bring in to you, accompanied by a payroll, who did you intend the check that you were signing would be for? A. To the man who earned it.

Q. What?

A. To the fellow who earned it.

(Testimony of A. M. Chrystall.)

Q. The payee named in the check?

A. Sure. [43]

Q. Did you intend that any of those checks would go to and become the property and money of Mr. Crowe? A. No.

Q. Did you have any knowledge or any notice of any kind prior to May of 1939 that any of these checks that you or Mr. Lawson or anybody else down there was signing were not going to the payees named in them? A. No notice.

Mr. Jones: Now I promise to connect this up by later witnesses, and if I should fail in my attempt it may be stricken, but I should like to ask a question or two on the assumption that these are forgeries.

Q. Did you have any knowledge or notice of any kind that he was endorsing or writing the payee's name on those checks and cashing them?

A. No.

Mr. Wood: I object to that on the ground that it is incompetent, irrelevant, and immaterial, and assumes a fact not in issue here and a fact not proved.

Mr. Jones: I had just made the statement, your Honor, that that could be stricken if I failed to connect it up by later testimony. I have got to get this testimony out of these two witnesses here that they had no knowledge of such practice.

The Court: Well, I think it is incompetent for them to say [44] that they had no knowledge of any

(Testimony of A. M. Chrystall.)

such practice, irrespective of whether it is connected up later or not, but I am not quite sure that that is the question you asked.

Mr. Jones: Would you read the question back?

(The question and answer were read.)

The Court: I was mistaken. I overrule the objection.

Q. (By Mr. Jones): If any payees in any of the 126 checks with which we are concerned here were not actually existing people, or what are sometimes referred to as fictitious persons, did you have any knowledge of that at the time you signed a check? A. No.

Q. In other words you thought that each payee was an existing person that was entitled to the money? A. Yes.

Mr. Jones: That is all. You may cross-examine.

Cross-Examination

By Mr. Wood:

Q. Mr. Chrystall, as far as your own knowledge goes each and every payee named in those checks actually got the money, did they not?

A. I didn't understand your question.

Q. As far as your own knowledge goes each man named in each one of those checks—you intended each should receive that money, didn't you?

A. That was the intention. [45]

Q. And as far as you know of your own knowledge he did receive it?

A. At that time, yes.

(Testimony of A. M. Chrystall.)

Q. Now when Mr. Crowe would bring you these checks and bring the payrolls along with them would you examine the payroll sheet yourself?

A. I saw that they were properly signed by the dock superintendent or the country agent.

Q. Did you go over it for any alterations or erasures or changes? A. No.

Q. You didn't check that? Is that right?

A. I did not.

Q. You just checked to see that the dock superintendent or the man in charge of the country warehouse had initialed them or signed them or approved them?

A. That he had signed the payrolls and that the payrolls had been checked in the office for extensions, and so forth.

Q. And as you signed the checks would you check each one back against the payrolls to see that the man's name and amount were correct?

A. I would go through them sometimes, and sometimes just sign them.

Q. And in doing that did you ever find two checks to a man for the same amount?

A. No. [46]

Mr. Wood: That is all.

Mr. Jones: That is all.

(Witness excused.) [47]

J. B. W. LAWSON

was thereupon produced as a witness in behalf of the plaintiffs herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Jones:

Q. Mr. Lawson, state your name in full for the record, please. A. J. B. W. Lawson.

Q. Mr. Lawson, what is your position?

A. An accountant with Balfour, Guthrie & Company.

Q. And as such are you authorized to sign checks for the Interior Warehouse Company?

A. Yes.

Q. Were you during the years 1935 to '39, inclusive? A. Yes.

Q. During that time Mr. Crowe was bookkeeper and would bring the payrolls and expenses of the Interior Warehouse to you with checks that he had had made out for signing? A. He would.

Q. To you or Mr. Chrystall? A. Right.

Q. When he brought them what would they be accompanied by?

A. He brought the payrolls with the checks.

Q. And you would sign the checks then?

A. Yes.

Q. What conversations, if any, would take place between you and [48] Mr. Crowe on such occasions?

Mr. Wood: What conversations?

Mr. Jones: Yes, what conversations would take place?

(Testimony of J. B. W. Lawson.)

Mr. Wood: I object to that as not binding upon the defendant.

Mr. Jones: Maybe it isn't.

The Court: Well, I think if you insist it is admissible.

Mr. Jones: I know it is, but I want to get at it in a different way, if your Honor please.

Q. These dock payrolls and the country payrolls would accompany his checks that were made out to your desk?

A. They were clipped together.

Q. And would he come with them?

A. Yes.

Q. When you signed those checks who did you intend them for? A. The payees.

Q. And did you have any knowledge at the time, assuming for the purpose of this question that Mr. Crowe did endorse some of those checks and sign the payee's name on them—did you have any knowledge that he was doing it? A. No.

Q. Did you know that he obtained any of the money of those checks prior to May of 1939?

The Court: Just a moment. That is the question I thought you asked before. I am going to strike out this matter of [49] assuming that he did certain things. I want you to proceed on the line of whether he knew or not.

Q. (By Mr. Jones): Did you know prior to May of 1939 whether Mr. Crowe was signing the payee's name of any of those checks and obtaining money on them himself?

(Testimony of J. B. W. Lawson.)

A. Do you mean endorsing them?

Q. Endorsing them.

A. No, I didn't know that.

Q. Did you intend any of the money to be for Mr. Crowe when you signed those checks?

A. No.

Q. What would be said between you and Mr. Crowe at the time that he would come in with those checks?

A. Nothing would be said at all except, "Here are the checks." That was all.

Q. It was just done in the regular course of business? A. Yes.

Q. You believing that they were proper checks and that you owed the money to those people?

A. Exactly.

The Court: At this time I want to make the ruling definite. I now strike from the record the question and answer assuming that Mr. Crowe did certain things, so the record will show that that is stricken.

Q. (By Mr. Jones): You thought in each instance that you [50] signed a check that your company actually owed the payee named therein the money? A. Yes.

Q. Now if there were any fictitious persons to whom any of those checks were made out—and by that term I mean people that weren't actually in existence that were named in there as payees—did you know that they were non-existent or fictitious persons? A. I didn't know.

(Testimony of J. B. W. Lawson.)

Mr. Jones: You may cross-examine.

Cross-Examination

By Mr. Wood:

Q. Mr. Lawson, in signing these checks would you compare the names and amounts back against the payroll?

A. Each name and each check down the list, one by one.

Q. And in addition to that did you notice the payroll as to whether there were any erasures or alterations appearing thereon?

A. I didn't notice.

Q. Did you examine specifically for that?

A. No.

Mr. Wood: That is all.

Redirect Examination

By Mr. Jones:

Q. There is one more question. Did Mr. Thom of the [51] Bank of California ever come to your office in May of 1939 or thereabouts and shortly after these losses were discovered to talk them over?

A. Yes, I would say that was in May.

Q. In May?

A. I think it would be in May. It was shortly after this thing was discovered.

Q. And the whole affair was discussed. Did he see the checks at that time?

A. I think he saw the checks. I think that is what he came for.

(Testimony of J. B. W. Lawson.)

Mr. Jones: That is all.

Mr. Wood: That is all, Mr. Lawson, except that you are under subpoena for this afternoon.

The Witness: Two o'clock. All right.

(Witness excused.)

Mr. Jones: There are no more that we have to take before twelve.

The Court: Court is in recess until two o'clock.

(Thereupon, at 12:20 o'clock P.M., March 26, 1941 a recess was taken until 2:00 P.M. of the same date.) [52]

Portland, Oregon, March 26, 1941.

2:00 o'clock P.M.

(After Recess.)

Mr. Jones: If the Court please, I brought Mr. Johnson back for cross-examination. There are no further questions that we are going to ask. You may take the witness stand.

J. F. JOHNSON

was thereupon recalled as a witness in behalf of the plaintiffs herein, and testified further as follows:

Cross-Examination

By Mr. Wood:

Q. Your testimony as I remember it, Mr. Johnson, was that you assisted in making the May, '39 audit. Is that right?

(Testimony of J. F. Johnson.)

A. Well, I was working there in May, 1939. The audit was actually as of March 31, 1939.

Q. But that particular audit you did assist in making? A. Yes.

Q. Had you assisted in making the 1938 audit also?

A. I assisted on the Balfour, Guthrie audit. I don't recall that I did any work on the Interior Warehouse Company.

Q. How about '37 and '36? Do you remember about those?

A. Well, I think the same situation was true, that I did work on the Balfour, Guthrie audit in each of those years.

Q. You heard the testimony about the test checks made, Mr. Rawlinson's testimony about test checks? [53]

A. I beg your pardon?

Q. The test check that you had made, you heard his testimony about that, that each year in making the Interior audit he would take a month—he didn't remember the month—and make test checks on that.

A. Yes, I heard that.

Q. And you know that was done of your own knowledge?

A. Well, I reconciled the bank account for the month of March, 1939.

Q. In reconciling that bank account did you have occasion to notice on these copies of these 19 missing checks that some of them had been voided, marked void on the copy?

(Testimony of J. F. Johnson.)

A. Well, if I understand correctly these 19 missing checks you refer to had not been issued in the month of March, 1939.

Q. That is correct. Some of that was in '35 and '38, as I remember. Did you make test checks in those years? A. No, I didn't myself.

Q. You didn't do that yourself? A. No.

Q. You heard Mr. Rawlinson's testimony that even without Crowe's assistance the data of this audit of '39 could have been compiled?

A. Yes, I heard that.

Q. Would that be true also of 1938?

A. Would you repeat the question again, please? [54]

Mr. Wood: Would you read that to him, Mr. Reporter?

(The question was read by the reporter.)

Mr. Jones: We object to that on two grounds; first, it is entirely out of the scope of the direct examination; on the second ground, we don't know exactly what Mr. Rawlinson had in mind in making that. It isn't this man's testimony.

The Court: I think that is always improper, to base the question on the testimony of another witness. I will strike the question and the answer.

Q. (By Mr. Wood): You participated in getting up the 1938 audit for the Interior?

A. I may have done some of the work, I don't recall just now, but I definitely had no work on the bank accounts for 1938.

Mr. Wood: That is all.

Mr. Jones: Thank you. That is all, Mr. Johnson.

(Witness excused.) [55]

R. G. GRIFFIS

was thereupon produced as a witness in behalf of the plaintiffs herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Jones:

Q. Will you state your full name into the record?

A. R. G. Griffis.

Q. And what is your position?

A. I am now employed by Balfour, Guthrie & Company.

Q. In what capacity? A. As accountant.

Q. How long have you been with them?

A. Since June, 1939.

Q. Where were you employed prior to that time?

A. Price, Waterhouse & Company.

Q. Did you have any work at all on this audit or this report that Price, Waterhouse got out on the matter that we are in controversy here today?

A. Yes, I was under Mr. Johnson.

Q. Now I am handing you Plaintiffs' Exhibits 15, 16, and 17. First I will take 15, which in the pre-trial order is referred to as copy of Page 32, cash receipts, August, 1939, defendant admitting au-

(Testimony of R. G. Griffis.)

thenticity and waiving objection that the original was not produced, but reserving the right to object on the ground of materiality, competency, and relevancy. The authen- [56] ticity, your Honor, has been admitted, and that is the original of cash receipts of the Interior Warehouse, or Balfour, Guthrie.

A. This is a copy of a page from the cash receipts of Balfour, Guthrie & Company.

Q. And there is an item on there affecting some receipts that were put into the Interior Warehouse. Will you point out what item that is, or check it?

The Court: I will take a recess at this time.

(A recess was then taken, after which proceedings were resumed as follows:)

Q. (By Mr. Jones): At the time that this loss that we are concerned with was paid by the two companies, Lloyds and American Surety, you were employed by Balfour, Guthrie? A. I was.

Q. And did you see the checks that came in?

A. Yes.

Q. I want you to refer to Exhibits 12, 13, and 13-A. Are those the checks which your company received in payment of the total claim?

A. They are.

Q. Now then, will you refer again to Exhibits 15, 16, and 17, taking up again Exhibit 15? You had stated, I believe, that that was a copy of Page 32 of the cash receipts of Balfour, Guthrie. [57]

A. Yes.

(Testimony of R. G. Griffis.)

Q. Does it show a receipt by that company of some \$5500? A. It does.

Q. Is it one of those checks there? A. Yes.

Q. What exhibit number?

A. It is Pre-Trial Exhibit No. 12.

Q. And the amount of Pre-Trial Exhibit No. 12 is shown as a receipt of Balfour, Guthrie & Company on Pre-Trial Exhibit No. 15?

A. That is right.

Q. Now take Pre-Trial Exhibit No. 13. Is that a check that also came in on this loss? A. Yes.

Q. And how much is it for?

A. That is for ten dollars.

Q. Now refer to Pre-Trial Exhibit 16.

A. That is recording the receipt of this ten dollars.

Q. And shows as a receipt on the company's books? A. Yes, it does.

Q. All right, now, take your Pre-Trial Exhibit No. 13. That is a check for a thousand, is it?

A. Yes.

Q. From the American Surety Company?

A. From American Surety Company. [58]

Q. Now take Pre-Trial Exhibit 17. The pre-trial order says that that is a copy of a tabulation headed "Balfour, Guthrie & Company, Limited, Portland, Oregon, cash receipt dated June 8"—

A. (Interrupting): That is right.

Q. "June 8, 1939, defendant admitting the authenticity and waiving the objection that the origi-

(Testimony of R. G. Griffis.)

nal was not produced, but reserving rights for relevancy", and so forth. Does that show the receipt to Balfour, Guthrie of the thousand dollar check?

A. It does.

Q. And by the way, what was the amount of the first check, No. 12, Pre-Trial Exhibit 12?

A. Twelve was \$5542.

Mr. Jones: That is all. You may cross-examine.

Mr. Wood: Don't you want to introduce those in evidence, Mr. Jones?

Mr. Jones: Well, I thought I would finish up my case and stick them all in at the same time, because you have admitted authenticity in each case.

Mr. Wood: That is right.

Mr. Jones: I am going to offer them all, but I will wait until I call my last witness. Mr. Crowe.

(Witness withdrawn.) [59]

G. L. CROWE

was thereupon produced as a witness in behalf of the plaintiffs herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Jones:

Q. Mr. Crowe, will you state your name in full for the record? A. Garth L. Crowe.

Q. Did you take a course in bookkeeping at some school? A. I did.

(Testimony of G. L. Crowe.)

Q. What school?

A. Central Business College.

Q. And when did you finish that course?

A. In 1920.

Q. What did you do from 1920 to 1925?

A. I was employed by the Hawkins Mortgage Company of Portland, Indiana.

Q. During 1926 what did you do?

A. I worked for the Western Union Telegraph Company.

Q. In those two jobs last mentioned were you in the auditing and bookkeeping departments?

A. I was with Western Union. I did some bookkeeping for the Hawkins Mortgage Company.

Q. From 1926 to 1928 you were with Western Union? A. Yes, sir.

Q. When did you come to Oregon? [60]

A. 1932.

Q. Just before coming to Oregon did you have any experience with a firm of public accountants?

A. I did.

Q. What was the firm?

A. Spradling, Carter & Jordan.

Q. Where were they located?

A. Indianapolis.

Q. On coming to Oregon what did you do when you first got here?

A. I worked on a ranch in Eastern Oregon.

Q. What year did you come to Portland?

A. 1933, in the fall.

(Testimony of G. L. Crowe.)

Q. Did you work for a firm of public accountants here? A. I did.

Q. Who? A. Price, Waterhouse.

Q. When did you work for them?

A. I started work for them in January, 1934.

Q. And did you work for another firm the same year? A. Yes, sir.

Q. Who were they?

A. Lybrand, Ross Brothers & Montgomery.

Q. And from there where did you go?

A. To Balfour, Guthrie & Company. [61]

Q. And when did you go to work for Balfour, Guthrie & Company? A. In August, 1934.

Q. And how long did you continue in the employ of Balfour, Guthrie & Company?

A. Until May, 1939.

Q. How old were you when you went to work for Balfour, Guthrie? A. Thirty-four.

Mr. Jones: I wish that the witness would be handed Pre-Trial Exhibit No. 1—or it is now Exhibit No. 1. I think that has been received in evidence.

Q. I would like to have you take those checks out and examine the face to see who signed them and the back to see who endorsed them. Let me interrupt. If you see any that are signed except by Mr. Lawson or Mr. Chrystall lay them aside as you go through.

(The witness examined the exhibit.)

(Testimony of G. L. Crowe.)

Q. Who had those checks prepared, do you know?

A. They were prepared under my direction.

Q. By some girl in the office? A. Yes.

Q. And after they were prepared who took them to the persons who signed them? A. I did.

Q. Who endorsed the payee's name on the back of those checks? A. I did. [62]

Mr. Jones: Now I want the witness to have Pre-Trial Exhibit No. 2.

Q. I want to direct your attention on Exhibit No. 2 to the carbon copies—or what is Exhibit No. 2?

A. These are carbon copies of checks.

Q. Prepared under whose direction?

A. Under my direction.

Q. I want to direct your attention to checks numbered 4016, 4004, 4003, 3965, 3762, 3761, 3760, 3499, 3496, and 3483. Now in the "B" series, 15920, 15566—that is the missing one. There is no carbon there for 15566. 15367, 15340. Do you find it?

A. No, not yet.

Q. 15340? A. Yes.

Q. All right, now, in the "A" series, 10622?

A. Yes.

Q. 10346? A. Yes.

Q. 10323? A. Yes.

Q. 10292? A. Yes.

Q. 10230? A. I don't see it here. [63]

Q. Do you find 10230 or 10229?

(Testimony of G. L. Crowe.)

A. No, it isn't here.

Q. Now along with that group of checks, all of which you have found so far except two—along with that group of checks do you find the carbon copies of other checks made to the same payee?

A. Yes.

Q. The other checks, the checks last mentioned, were those checks actually turned over to the payee named in them? A. No, sir.

Q. Now, the checks that I am last talking about. The ones that we first read, they weren't turned over to the payee, you say? A. No, sir.

Q. Now where there are duplicate checks there, or checks to the same persons, or drafts for the same amount, were they turned over to the payee?

A. They were, yes, sir.

Q. So the checks that we have just been reading the numbers on, as far as you have found them were checks that were prepared under your direction? A. They were.

Q. And you had the officer sign them?

A. Yes, sir.

Q. And who endorsed the payee's name on those checks? [64] A. I did.

Q. Do you know what became of the originals?

A. Yes, sir.

Q. What? A. I destroyed them.

Q. This check B-15566 and this A-10230, did you also have those checks prepared?

A. Yes, sir.

(Testimony of G. L. Crowe.)

Q. And have you made some check and investigation to know whether you are the one that put your name on those checks? A. Yes, sir.

Q. I mean endorse the payee's name on those checks. You endorsed the payee's name on those?

A. I did.

Q. And so although you can't find any evidence of those, even in the copies and the other records, the books and payrolls, are you able to identify checks B-15566 and A-12030 as checks that you had prepared and on whose back you endorsed the payee's name? A. Yes, sir.

Q. Did you ever have authority from those payees to endorse their names on them?

A. No, sir.

Q. Do you know whether the payees or any of them knew that you were endorsing their names on them? [65] A. No.

Q. Why did you write the names on there?

A. To get that money for myself.

Q. Did you keep it yourself? A. I did.

Q. Use it yourself? A. Yes, sir.

Q. No part of it was ever turned over to the payees? A. No.

Q. When you took those checks in to the various officers to sign the checks what representations did you make to them?

A. I represented these checks as being checks due the payee and supported that with the payroll for the officer to sign the check.

(Testimony of G. L. Crowe.)

Q. And did you take the payrolls with you?

A. Yes, sir.

Q. Did you ever at any time tell the payees of any of those 126 checks with which we are concerned here about them? Did they ever have any knowledge of those checks from you?

A. No, sir.

Q. Were any of the amounts of those checks due you from the Interior Warehouse Company?

A. No, sir.

Q. If there are any fictitious persons to whom you made any of those checks did you inform the Interior Warehouse Company of [66] that fact?

A. No, sir.

Q. Who wrote their names on those checks as signing for the makers on those that you laid out?

A. Do you mean except for Mr. Lawson and Mr. Chrystall?

Q. Yes, who were those men?

A. They were signed by John Dickson and D. W. L. MacGregor.

Q. Were those handled by you in just the same manner as the ones that Lawson and Chrystall signed?

A. Yes, sir.

Mr. Jones: I want to have the witness see Exhibit No. 4.

Q. Is Exhibit No. 4 in your handwriting?

A. Yes, sir.

Q. Is it signed by you?

A. Yes, sir.

Q. Does that refresh your memory on the facts there stated?

A. Yes.

(Testimony of G. L. Crowe.)

Q. Were there any persons named in any of these checks who were non-existent, who were fictitious people?

A. They were as far as I was concerned.

Q. Who were they?

A. Shall I read them off to you?

Q. Yes.

A. C. Clarkson, C. Warren, C. W. Clark, L. G. Cross, A. R. Reed.

Q. The rest of the checks were made to people who were actually [67] in existence, living people, but who had nothing coming to them—is that right—as far as those checks were concerned?

A. That is right.

Mr. Jones: Now at this time, if the Court please, I wish to offer in evidence Pre-Trial Exhibits 1-A and 1-B in lieu of Pre-Trial Exhibit No. 1, the original checks, with the understanding that the original checks, Exhibit No. 1, may remain with the court until the case is decided, but thereafter we would like 1-A and 1-B to stand in lieu of them and the originals to be returned to the plaintiffs or to whoever is entitled to them.

The Court: Yes.

(The photostatic copies of checks heretofore marked Plaintiffs' Pre-Trial Exhibits 1-A and 1-B, respectively, were thereupon received in evidence.)

Mr. Jones: We would like to offer at this time Pre-Trial Exhibit No. 2. That is the carbon copies

(Testimony of G. L. Crowe.)

of the 19 missing checks except the two that I mentioned which the records have been completely destroyed on, and attached to it are the carbon copies of other checks which were made for the same amounts or similar amounts or had the amounts included in them and went to the people that they were due to, and the 19 checks listed at the bottom of Page 6 of the pre-trial order are the duplicates that were made by this man for his own benefit. [68]

Mr. Wood: That exhibit is objected to, your Honor, on the ground that it is incompetent, immaterial, and irrelevant. They couldn't make the tender that the law requires of the original checks—they don't claim they ever did. They can't present them to the Court to sell them to us in case we lose the lawsuit and have to pay the judgment. They can't show who the prior endorsers are or produce the paper itself. This question goes to the proposition of whether or not our legal rights are being impaired by their failure to produce the original paper which they have to produce and give to us in case we buy it.

The Court: Well, the very distinction that you are calling attention to entitles these to admission in evidence. As far as their admissibility in evidence, I think they are admissible, and I so rule.

(The carbon copies of checks, heretofore marked Pre-Trial Exhibit No. 2, was thereupon received in evidence.)

PAY ROLL FOR

AMOUNT OF CHECK

Pay-Roll Remittance Voucher

Employee Number 542-01-9877

For earnings to Nov. 30, 1938
 Month Worked Reg. Overtime

Amount Earned \$76.00

Deductions:

State Unemp. Tax
 Fed. Old-Age Tax
 Group Ins.
 Advance

.77

Total Deductions
 Net Amount Paid

76.03

DETACH AND RETAIN THE VOUCHER
 Interior Warehouse Company

Dec. 2nd, 1938

Nº 4004

76.03

ID THORPE

(Testimony of G. L. Crowe.)

Mr. Jones: At this time we also are offering in evidence the Price, Waterhouse report, Pre-Trial Exhibit No. 3. I have some cases on the admissibility of that; I am not going to take the Court's time to refer to them.

The Court: Is that the audit?

Mr. Jones: That is the audit.

The Court: The audit as a whole is rejected. [69]

Mr. Jones: What is that?

The Court: The audit as a whole is rejected. If the offer is in that form it is rejected.

Mr. Jones: I want to again read what they have admitted about its authenticity, and so forth: "Audit of Price, Waterhouse & Company admitted by the defendant to be the original of such audit without further identification, subject, however, to any and all legal objections to any statement, matter, or thing therein contained where the same is or are not supported at the trial by bank statements, original documents, or legally admissible testimony to be produced or supplied by the plaintiffs." Now in support of our feeling that this is admissible I want to call the Court's attention to the fact that Mr. Rawlinson had stated that to his best understanding—or words to that effect—all of the supporting evidence for the audit is found in that group of exhibits over there. He had been here personally when the 19 checks, the originals of which have been destroyed, were collected, and that

(Testimony of G. L. Crowe.)

the audit could have been produced without the testimony of Mr. Crowe and facts were available for them at the time out of which they could have compiled it on the face of their record.

(The matter was thereupon argued to the Court.)

The Court: The objection to the exhibit as a whole must be sustained. For instance, this isn't a true audit like the one that you were talking about. It apparently requires a [70] lot of strenuous explanations by the accountant on matters which I am quite sure are based on hearsay or that he doesn't know anything about. We heard his testimony on the stand this morning. There are statements like this appearing in the introduction: "Following the acknowledgment made to us by Mr. G. L. Crowe that there were irregularities in the accounts kept by him", and so forth. That statement is purely hearsay. I don't think that it would do any harm. On page 3, the second whole paragraph: "During the course of our examination and in the presence of our representatives, all of the checks enumerated on Schedules 1 to 6 were listed by Mr. G. L. Crowe in his handwriting with appropriate notations regarding the conversion to his own use of the proceeds." You have the witness here. Why don't you have him testify to these things that you want? The audit as a whole is not admissible on

(Testimony of G. L. Crowe.)

that account. Now as far as the tabulations are concerned I think that they are properly admissible, but in the statement of funds withdrawn which appears on Exhibit A, covering improper disbursements, I think Schedule 1 probably is objectionable.

Mr. Jaureguy: I didn't get which one that was, your Honor.

The Court: I say, on Schedule 1. I take it as a part of Exhibit A, though I am not sure; it is the next page, anyhow. It says, "Schedule 1." Apparently that notation isn't objectionable because it shows what the auditors were doing. That applies [71] also to the other two remarks on that page. Apparently those are all right. Then on Schedule 2, "The endorsements on the checks listed do not correspond with the signatures of the employees." The accountant this morning testified he wasn't a handwriting expert. Unless you are going to prove that those are different the Court **from inspection** can make up its mind as well as the witness whether they are similar. That same remark applies also in Schedule 3, also on Schedule 4, and on Schedule 5, "List of amounts charged by the bank on the company's bank statements showing payments where paid checks as evidence thereof are not available, possibly destroyed." I think that is a conclusion that the Court might draw. I don't think the witness has any right to draw it or that it can be included properly in this.

(Testimony of G. L. Crowe.)

Likewise the notation as to the check at the bottom of the page, May blank, 1936, A-10230. In Schedule 6 the same statement which the Court previously referred to again appears in parentheses. I am not quite sure but what the main heading is hearsay and I am not positive if there is any basis for the notation appearing at the bottom of Schedule 6. I don't think Exhibit B is admissible if it isn't the work of the auditor, if he is relying on something else; "Copy of lists of checks and notations as prepared by Mr. G. L. Crowe in presence of a representative of Price, Waterhouse & Company." If Mr. Crowe is going to do that you had better do it on the stand on cross examination, [72] and so I sustain the objection to the document as a whole. I think that has no bearing whatsoever on the authorities that you have read. I think that there are computations possibly that can be introduced either in this form or another, but I think that the basis which is being used by these auditors has no basis in evidence. They are trying to prove something, and they have drawn conclusions which as the trier of facts in this case I am going to draw.

Mr. Jones: Well, if the Court please, I will go ahead with the rest of my exhibits and then by that time it will be about recess time, I hope, and then I would like for just a minute to go through it more carefully for the purpose of additional testimony on those points.

(Testimony of G. L. Crowe.)

The Court: Yes.

Mr. Jones: With respect to Exhibit 7, which is a policy of the American Surety Company, it is admitted by the defendant to be the original without further identification. They have reserved an exception to the materiality, and I would like to offer the American Surety Company's policy at this time.

Mr. Wood: We have no objection.

The Court: Admitted.

(The policy of the American Surety Company, heretofore marked Plaintiffs' Pre-Trial Exhibit No. 7, was thereupon received in evidence.)

PLAINTIFFS' EXHIBIT No. 7

AMERICAN SURETY COMPANY

of New York

Organized 1884

Company's Home Office Building

100 Broadway, New York

The American Surety Company of New York (hereinafter called the Surety), in consideration of an agreed premium, binds itself to pay to Balfour, Guthrie & Co. Ltd. and/or Crown Mills and/or Interior Warehouse Company hereinafter called the Employer), within sixty (60) days after satisfactory proof thereof, such pecuniary loss as the Em-

(Testimony of G. L. Crowe.)

ployer shall have sustained of money or other personal property (including money or other personal property for which the Employer is responsible) through the fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction or wilful misapplication committed directly or in connivance with others by any employee or employees named upon the schedule attached hereto and made a part hereof, in any position, anywhere, during the period commencing with the respective dates set opposite the name of the employee or employees in such schedule, and ending with the termination of the suretyship for any employee by his dismissal or retirement from the service of the Employer, by the discovery of loss hereunder, or by cancellation by the Employer or the Surety.

Provided, that if at the time of the issuance of this bond, one employee only is designated on said schedule, it is understood and agreed, notwithstanding anything contained herein to the contrary, that coverage is afforded in respect to such named employee, only, and that it will not be permissible to include or add hereto at any future period the name of any other employee.

The liability of the Surety on account of any one employee shall not exceed the amount set opposite the employee's name in said schedule. The Employer may, during the continuance of this bond, add other employees to said schedule or increase

(Testimony of G. L. Crowe.)

or decrease the amount of suretyship for any employee, by giving written notice to the Surety, but such notice shall not be binding on the Surety until the Employer has received the Surety's written acceptance thereof. In the event of such increase or decrease, the Surety's liability as respects such employee shall not exceed the scheduled amount in effect as to such employee when the dishonest act of the employee shall have been committed. The Surety's liability shall in no event exceed the maximum amount at any time in effect in said schedule as to such employee.

Upon the discovery by the Employer of any dishonest act on the part of any employee the Employer shall give immediate written notice thereof to the Surety at its Home Office. Affirmative proof of loss under oath, together with full particulars of such loss, shall be filed with the Surety at its Home Office within three (3) months after such discovery.

Any claim hereunder must be duly made upon the Surety within fifteen (15) months after the termination of the suretyship for the defaulting employee, and no suit, action or proceeding shall be brought hereunder by the Employer against the Surety after the expiration of twelve (12) months after the filing of proof of loss as above required, or, in case such limitation be void under the law of the place governing the construction hereon then

(Testimony of G. L. Crowe.)

within the shortest period of limitation permitted by such law.

The suretyship for any or all employees may be cancelled:

(a) By the Surety, by giving thirty days' notice of cancellation to the Employer in writing of its desire to so cancel;

(b) By the Employer, by giving notice to the Surety in writing of the Employer's desire so to cancel.

In the event of such cancellation and no claim having been made hereunder the Surety shall refund the unearned premium, if any.

It is understood and agreed that the Employer may add new or additional employees other than those appearing on the schedule. Each new employee shall be automatically added to the schedule beginning with the date of his employment in the amount of One Thousand and 00/100 (\$1,000.00) Dollars, except that the liability of the Surety as to any such new employee shall terminate at the expiration of sixty (60) days from the date his employment begins, unless prior thereto the Employer shall notify the Surety and the Surety shall give its written acceptance of such liability.

In witness whereof, the American Surety Company of New York has caused this bond to be signed

(Testimony of G. L. Crowe.)

by its duly authorized officers and its corporate seal
to be hereunto affixed this 1st day of July, 1932.

AMERICAN SURETY

COMPANY OF NEW YORK,

By (sgd.) C. S. FILLER,

Resident Vice President.

Attest: (sgd.) W. A. KING,

Resident Asst. Secretary.

(sgd.) C. S. FILLER,

Resident Agent.

AMERICAN SURETY COMPANY

of New York

Organized 1884

Company's Home Office Building

100 Broadway, New York

RIDER

Whereas certain fidelity suretyship with the
American Surety Company of New York as Surety
to Balfour, Guthrie & Co., and/or Crown Mills
and/or Goldenrod Milling Company and/or Inter-
ior Warehouse Company, as their interests may
appear, Portland, Oregon, as Employer, to-wit:

Fidelity Schedule Bond #13341, dated July 1st,
1924

is superseded by this rider and Fidelity Schedule
Bond executed July 1st, 1932 by said Surety to said
Employer.

Now, therefore, in consideration of the premises,
and premium to be paid to the Surety, it is under-
stood and agreed by the Surety and Employer:

(Testimony of G. L. Crowe.)

(a) That said superseded suretyship is terminated on the issuance of this rider and superseding fidelity schedule bond attached;

(b) That as long as the right exists under the terminated suretyship for any employe, to make claim against the Surety, or to proceed on such claim, the liability of the Surety for loss claimed and recoverable under said terminated suretyship and for loss occurring under the attached fidelity schedule bond shall not in the aggregate exceed the larger or largest amount for which the Surety has become liable for such employee under said terminated suretyship and the attached fidelity schedule bond;

(c) That if loss which would have been recoverable under the superseded suretyship for any employee had it not been terminated shall be discovered after the right to make claim thereunder has expired, and if such loss be of a kind that would be recoverable under the attached fidelity schedule bond had it occurred during the currency thereof, such loss, and any and all loss caused by such employee and occurring after the effective date of the attached fidelity schedule bond and recoverable thereunder, but not in the aggregate exceeding the amount for which the Surety has become liable for such employee under the attached fidelity schedule bond on the date hereof, may be recovered by the Employer if claim be duly made upon the surety

(Testimony of G. L. Crowe.)

within the time and in the manner required by the attached fidelity schedule bond for recovery of loss thereunder.

In Witness whereof the Surety has set its hand and seal this 1st day of July, 1932.

AMERICAN SURETY
COMPANY OF NEW YORK,

By (sgd.): C. S. FILLER,
Resident Vice President.

Attest: (sgd.) W. A. KING,
Resident Asst. Secretary.

Accepted:

BALFOUR, GUTHRIE & CO., LIMITED.

By: (sgd.) J. A. DICK.

NOTICE OF ACCEPTANCE

American Surety Company of New York
Company's Office Building
100 Broadway, N. Y.

Branch office at Portland, Oregon. Date July 1st, 1934.

Balfour, Guthrie & Co. Ltd. and/or Crown Mills and/or Interior Warehouse Company, Portland, Oregon.

In consideration of an annual premium and subject to the terms of this Company's Schedule Fidelity Bond issued to you, the liability of this Company thereunder, as Surety for the following named em-

(Testimony of G. L. Crowe.)

ployes, is specified as being in the amount and from the date set opposite the names of such employes, respectively. It is understood that the liability is not cumulative and that the American Surety Company of New York does not assume liability during any year or years or for any default or defaults in the aggregate exceeding the amount of its suretyship as determined by the original obligation of suretyship.

AMERICAN SURETY
COMPANY OF NEW YORK,
By W. A. KING,
Resident Vice President.

#599759-D

Resident Assistant Secretary.

[Endorsed]: Filed Mar. 29, 1941.

Mr. Jones: Now then, 4, 5, and 6 will not be important [73] exhibits as long as we were able to locate and get Mr. Crowe here. Does your Honor care to keep this number system, or do you number them chronologically?

The Court: No, I want the numbers at the trial to correspond with the numbers of the pre-trial exhibits, so that anyone going over the record afterwards can see just which ones are admitted and which ones are excluded.

Mr. Jones: The next exhibit that we have will

(Testimony of G. L. Crowe.)

be Pre-Trial Exhibit No. 8, which is a Lloyd's policy, and I think with the same admission by the defendant and subject to the same reserved objection.

Mr. Wood: There is no objection.

The Court: Admitted.

(The policy of Lloyd's, London, heretofore marked Plaintiffs' Pre-Trial Exhibit No. 8, was thereupon received in evidence.)

PLAINTIFF'S EXHIBIT No. 8

(Stamped): 2194 * 30 Jun 1938

529

G

Form J (a)

No. N 36882.

LLOYD'S, LONDON.

D. C.

Balfour Guthrie and Co. etal.

\$25,000 @.....% \$320.00

Policy and Stamp .25

158. \$320.25

Date of Expiry: 1st April, 1939.

The Assured is requested to read this Policy, and, if incorrect, return it immediately for alteration.

In the event of any occurrence likely to result in

(Testimony of G. L. Crowe.)

a claim under this Policy, immediate notice should be given to: Lewis & Cartwright, Inc., Insurance, Surety Bonds, Lewis Building, Atwater 5053, Portland, Ore.

No Policy or other Contract dated on or after 1st Jan., 1924, will be recognized by the Committee of Lloyd's, as entitling the holder to the benefit of the Funds and/or Guarantees lodged by the Underwriters of the Policy or Contract as security for their liabilities unless it bears at foot the Seal of Lloyd's Policy Signing Office.

J (a)

Form approved by Lloyd's Underwriters' Fire and Non-Marine Association.

LLOYD'S POLICY.

(Subscribed only by Underwriting Members of Lloyd's who have complied in all respects with the requirements of the Assurance Companies Act of 1909 as to security and otherwise.)

(Seal.)

Any person not an Underwriting Member of Lloyd's subscribing this Policy, or any person uttering the same if so subscribed, will be liable to be proceeded against under Lloyd's Acts.

\$25,000.

N 36882.

Printed at Lloyd's, London, England.

Whereas Balfour Guthrie and Company Limited &/or Crown Mills &/or Coos Feed and Seed Stores

(Testimony of G. L. Crowe.)

&/or Interior Warehouse Company &/or all their affiliated, Proprietary, Parent or Subsidiary Corporations or Partnerships.—of—(hereinafter called “the Assured”), have paid \$320.00 (being 100% of Underlying Premium) Premium or Consideration to Us, who have hereunto subscribed our names to Insure against Loss as follows:—as per Wording attached hereto:—

Attaching to and Forming Part of Lloyd’s Policy No. N. 36882 Effected With Lloyd’s Underwriters.

1. This policy is for an amount of \$25,000 applying to each and every and all employees or persons bonded primarily as hereinafter described in a Bonding Company, the intent and meaning being that under this Policy the Underwriters shall not be liable for a sum of more than \$25,000 in the aggregate in respect of any or all losses.

2. This Policy is to indemnify the Assured for any loss they may sustain by reason of infidelity or dishonesty of any or all of their employees, or from any other cause stated in the Primary Policy and covered thereunder. This Policy is subject to all the same terms and conditions as the Primary Bond and/or Bonds in the Bonding Company of which this Policy pays the excess in so far as the terms and conditions of the Primary Bond and/or Bonds do not conflict with the following specific conditions of this policy.

(Testimony of G. L. Crowe.)

Conditions.

3. (a) It is a condition of this Policy that all employees or persons covered hereby shall be bonded in a Bonding Company and it is further understood and agreed that the Underwriters hereon shall be liable only for the losses in respect of any employee and/or person so bonded when the loss exceeds the amount for which such employee or persons is bonded in the Bonding Company and then only for the loss in excess of such Primary Bond.
- (b) It is a condition of this Policy that no employee or person covered hereunder shall be bonded in a Bonding Company for a sum of less than \$1,000.
- (c) Warranted free from all claims for losses not discovered within the period of this Policy, and for losses sustained prior to the 1st day of July, 1930, but with the understanding that in the event of non-renewal the Assured shall have the same period of time as provided in the discovery clause in the primary bond following the expiry date of this Policy in which to discover losses which may have occurred between the day named in this warranty and the expiry date of this Policy provided always that such discov-

(Testimony of G. L. Crowe.)

ery period shall not exceed three years from the expiry date hereof.

Definition

The term "Bonding Company" as used herein shall be understood to mean an American or "Canadian Bonding Company" or other Bonding Company operating in the United States of America and/or Canada.

(4) The premium is based on the understanding that the total number of employees or persons covered at the inception hereof was 128 and that such employees were then bonded as aforesaid for a total sum of \$128,000.

(5) Additions or reductions to staff held covered automatically following the underlying American Surety Company on same terms (other than the excess hereunder) subject to final adjustment of premium on expiry. Such adjustment of premium to be calculated at 100% (One Hundred Per Cent) of the additional or return premium payable in connection with the Primary Bond and/or Bonds.

CANCELLATION CLAUSE.

(Approved by Lloyd's Underwriters' Fire and Non-Marine Association.)

This Policy may be cancelled at any time at the request of the Assured in writing to the Broker who

(Testimony of G. L. Crowe.)

effected the insurance, and the premium hereon shall be adjusted on the basis of the Underwriters receiving or retaining the customary short term premium.

This Policy may also be cancelled by or on behalf of Underwriters by 10 days' notice given in writing to the Assured at his last known address, and the premium hereon shall be adjusted on the basis of the Underwriters receiving or retaining pro rata premium.

Notice shall be deemed to be duly received in the course of post if sent by pre-paid letter post properly addressed.

Printed at Lloyd's, London, England. 2/12/35

LIST OF EMPLOYEES

Balfour, Guthrie & Co., Limited
and/or Crown Mills, a Corporation and/or
Interior Warehouse Company and/or
Coos Feed & Seed Stores.

As of April 1, 1938.

BALFOUR, GUTHRIE & CO., LTD.	CROWN MILLS	INTERIOR WAREHOUSE CO.
Atkinson, Robert G. S.	Amer, L. J.	Alexander, F. N.
Andrews, John	Anders, William H.	Bumgarner, Walter C.
Angus, James M.	Baker, Fred E.	Darnielle, Frank A.
Cameron, D. S.	Baracco, Peter	Elledge, Chas. C.
Campbell, John	Baracco, T.	Foster, Guy C.
Chrystell, Andrew M.	Beauvais, Alexander J.	Franklin, R. B.
Cormack, James	Brock, H. A.	Frischknecht, John A.
Crowe, G. L.	Brophy, James P.	Green, Cornett

(Testimony of G. L. Crowe.)

**BALFOUR, GUTHRIE
& CO., LTD.**

**CROWN
MILLS**

**INTERIOR
WAREHOUSE CO.**

Dick, James A.
Dickson, Marguerite
Dickson, Rachel.
Dillon, Louis M.
Dwyer, Emily
*Ehelebe, Wm. A.
Ellis, William H.
*Fowler, Roy S.
Garvin, Donald E.
Hanton, John B.
*Harvey, Wm. S.
*Higgins, Joseph O.
Howatt, Arthur U.
Johnson, Florence H.
Johnson, Otto C.
Jones, Albert E.
Laidlaw, Lansing
Lawson, J. B. W.
MacGregor, D. W. L.
Marshall, Donald C.
Martin, George R.
McElvogue, Thos. R.
Mills, Arthur G.
Myers, Robert A.
Pattullo, William N.
Pooley, Bayfield R.
Runciman, A.
Russell, Hugh
Shepherd, Robert F.
Sorensen, Stanley R.
*Steel, Harry B., Jr.
Strang, John B.

Bunsen, Carl F.
Callison, P. G.
Carney, John P.
Clark, George
Clark, Thos. R.
Dear, C. R.
Deibert, Mary E.
Denman, Herbert
Dickson, Arthur John
Dykeman, C. A.
Fawver, Everett M.
Gillespie, Darrell
Griffin, William
Grim, M.
Hall, Claude C.
Hanson, Clyde
Haskins, Frank B.
Jensen, George V.
Kisky, Christian
Laasch, Ernest G.
Lamb, C. C.
Larsh, Frank B.
Mack, William M.
Mathies, Alfred G.
Mattice, W. A.
Metler, Wm. K.
Miller, Ray P.
Mills, James H.
Nebergall, Harry L.
O'Connor, John R.
Pallant, A. G.
*Smith, Dan O.
Snipes, Edward C.
Snipes, Joseph E.

*Griffith, Elmer
Hatcher, Frank
Henning, Paulski
Imlay, James W.
Irving, L. H.
Lindsay, D. D.
Marvel, Arthur A.
McKean, Robert H.
Miller, George P.
*Morgan, Raleigh
Rodman, Fred L.
Rumohr, Louise
Star, C. L.
Sutherland, William
*Shields, Fred A.
Todd, James P.

**COOS FEED &
SEED STORES**

Barklow, Dan, Jr.
Barklow, Leslie V.
*Gillespie, Agnes I.
Gillespie, James D.
Griffin, Rural
Hufford, E. D.
Kollar, Dewey S.
Lucas, Harry
*Mills, Allen T.
Ward, Spencer

(Testimony of G. L. Crowe.)

BALFOUR, GUTHRIE & CO., LTD.	CROWN MILLS
Vosper, C. V.	Stephens, C. E.
Walker, Kathleen E.	Stockdale, Ziba L.
Wood, Edgar F.	Strang, Robert B.
*Woodruff, Jas. R.	Thomas, Ralph
	Walker, George
	Walker, Theodore D.
	White, William L.
	Worden, Homer

(*)New employees taken on during year 1937 and still on as of 4/1/38

	Balfour Guthrie	44
TOTAL —	Crown Mills	50
	Interior Warehouse	24
	Coos Feed & Seed	10

128

BALFOUR GUTHRIE & CO., LTD., ET AL.

Excess Fidelity Bond N-23473

LIST OF EMPLOYEES PUT ON OR TAKEN OFF DURING THE
POLICY YEAR APRIL 1, 1937 TO APRIL 1, 1938

<u>Put on:</u>		<u>Date</u>	<u>Pro Rata Additional Premium</u>
Gillespie, Agnes I.	(Coos Feed & Seed)	April 1, 1937	\$2.50
Griffith, Elmer	(Interior Whse)	"	2.50
Stewart, Bradley	" "	"	2.50
Fowler, Roy S.	(Balfour Guthrie)	July 31, 1937	1.67
Harvey, Wm. S.	" "	"	1.67
Higgins, Jos. O.	" "	"	1.67
Steel, Harry B., Jr.	" "	"	1.67
Ehelebe, Wm. A.	" "	Aug. 13, 1937	1.59
Morgan, Raleigh	(Interior Whse)	Sep. 10, 1937	1.39
Woodruff, Jas. R.	(Balfour Guthrie)	Oct. 1, 1937	1.25
Mills, Alan T.	(Coos Feed & Seed)	Nov. 1, 1937	1.04
Shields, Fred A.	(Interior Whse)	Feb. 1, 1938	.40
			<hr/> \$19.85

(Testimony of G. L. Crowe.)

Taken off:			Pro Rata Return Premium	
Hawkins, Geo.	(Interior Whse)	April 1, 1937	2.50	
Gray, Frank	(Balfour Guthrie)	June 1, 1937	1.50	(*)
Laughton, Wm. M.	" "	"	1.50	(*)
Button, Arthur	" "	July 1, 1937	1.50	(*)
McKean, J. C.	(Interior Whse)	"	1.50	(*)
MacDonald, Alan C.	(Balfour Guthrie)	Aug. 31, 1937	1.46	
Andrus, Helen	(Interior Whse)	Sept. 8, 1937	1.40	
Watson, Alex	" "	Sept. 10, 1937	1.39	
Clute, Perry O.	(Crown Mills)	Jan. 1, 1937	.61	
Stewart, Bradley	(Interior Whse)	Feb. 1, 1938	.40	\$13.76
Net Additional Premium Due.....				\$ 6.09

(*)Minimum Earned Premium=\$1.00 applying to all employees taken off.

Employees last year..... 125

Taken off during year..... 10

115

Added on during year..... 12

127

Added on as of April 1, 1938 (Dan O. Smith).... 1

Employees this year..... 128

It is hereby declared and agreed that the domicile or domiciles of the Company and its affiliated Proprietary parent or subsidiary corporations or partnerships are as follows:

Balfour, Guthrie & Co. Ltd.—733 South West Oak Street, Portland, Oregon.

Crown Mills,—733, South West Oak Street and 1362, North West Front Avenue, Portland.

(Testimony of G. L. Crowe.)

Coos Feed and Seed Stores—320, Front Street, Coquille., Oregon. 700 South Broadway, Marshfield, Oregon. 28, Fifth Street, Myrtle Point, Oregon.

Interior Warehouse Company.—733, South West Oak Street, Portland, Oregon.

during the period commencing with the 1st of April, 1938, and ending with the 1st of April, 1939, both days at Noon.

If the assured shall make any claim knowing the same to be false or fraudulent, as regards amount or otherwise, this Policy shall become void, and all claim thereunder shall be forfeited.

Now know ye, that We the Underwriters do hereby bind Ourselves, each for his own part, and not one for Another, our Heirs, Executors, and Administrators, to pay or make good to the Assured or to the Assured's Executors, Administrators, and Assigns, all such Loss or Damage as aforesaid as may happen to the subject matter of this Insurance, or any part thereof during the continuance of this Policy; not exceeding the Sum of Twenty Five Thousand United States Dollars, such payment to be made within Seven Days after such Loss is proved and that in proportion to the several Sums by each of Us subscribed against our respective Names not exceeding the several Sums aforesaid.

In witness whereof We, Underwriting Members of Lloyd's, have subscribed our Names and Sums of Money by Us insured.

(Testimony of G. L. Crowe.)

Dated in London, the 3rd Day of May, One Thousand Nine Hundred and Thirty Eight.

Portland, Oregon, U. S. A.,
June 19th, 1939.

Please pay all losses for our account to Messrs.
Gardner, Mountain & D'Ambrumenil Ltd.

BALFOUR, GUTHRIE & CO.,
LIMITED,

By (Illegible)
Vice-President.

(Stamped): R. B. 655

Claim \$5542.43

Fee 120.00

Settled hereon a claim for Embezzlement by G. L.
Crowe of \$5662.43, London 6th July 1939.

GARDNER, MOUNTAIN &
D'AMBRUMENIL LTD.

\$22.65% applying to Renewal N 44987.

(Stamped): Not legible.

Mr. Jones: With respect to Pre-Trial Exhibit No. 9, it is a photostatic copy of another Lloyd's policy, defendant admitting authenticity but reserving the same right to make objection on the ground of materiality.

Mr. Wood: There is no objection.

The Court: Admitted.

(Photostatic copy of Lloyd's policy, heretofore marked Plaintiffs' Pre-Trial Exhibit No. 9, was thereupon received in evidence.) [74]

(Testimony of G. L. Crowe.)

PLAINTIFF'S EXHIBIT No. 9

(Stamped): 2575 * 27 Jun 1939

529.

Form J (a)

No. N 44987.

LLOYD'S, LONDON

MH.

Balfour Guthrie & Co. Ltd., &/or Crown Mills
Feed and Seed Stores &/or Interior Warehouse Co.,
&/or all their affiliated, Proprietary, Parent or Sub-
sidiary Corporations or Partnerships.

\$25,000 @.....% \$312.50

Policy and Stamp .25

351.	\$312.75
	<hr/>
	<hr/>

Date of Expiry 1st April, 1940.

The Assured is requested to read this Policy, and,
if incorrect, return it immediattely for alteration.

In the event of any occurrence likely to result in
a claim under this Policy, immediate notice should
be given to:—Lewis & Cartwright Inc.

Issued in an unauthorized company by Durham
& Bates Oregon Surplus Line License No. 6.

No Policy or other Contract dated on or after 1st
Jan., 1924, will be recognized by the Committee of
Lloyd's as entitling the holder to the benefit of the
Funds and/or Guarantees lodged by the Under-
writers of the Policy or Contract as security for
their liabilities unless it bears at foot the Seal of
Lloyd's Policy Signing Office.

J (a)

(Testimony of G. L. Crowe.)

Form approved by Lloyd's Underwriters' Fire and Non-Marine Association.

Any person not an Underwriting Member of Lloyd's subscribing this Policy, or any person uttering the same if so subscribed, will be liable to be proceeded against under Lloyd's Acts.

\$25,000.

Printed at Lloyd's, London, England.

No. 44987.

LLOYD'S POLICY.

(Subscribed only by Underwriting Members of Lloyd's who have complied in all respects with the requirements of the Assurance Companies Act of 1909 as to security and otherwise.)

Whereas Balfour Guthrie and Company Limited &/or Crown Mills &/or Coos Feed and Seed Stores &/or Interior Warehouse Company &/or all their affiliated, Proprietary, Parent or Subsidiary Corporations, or Partnerships.—of—(hereinafter called "the Assured"), have paid \$312.50 (being 100% of Underlying Premium). Premium or Consideration to Us, who have hereunto subscribed our Names Insure against Loss as follows:—as per Wording attached hereto—Attaching to and Forming Part of Lloyd's Policy No. N. 44987. Effected With Lloyd's Underwriters.

1. This Policy is for an amount of \$25,000 applying to each and every and all employees or persons bonded primarily as hereinafter described in a

(Testimony of G. L. Crowe.)

Bonding Company, the intent and meaning being that under this Policy the Underwriters shall not be liable for a sum of more than \$25,000 in the aggregate in respect of any or all losses.

2. This Policy is to indemnify the Assured for any loss they may sustain by reason of infidelity or dishonesty of any or all of their employees, or from any other cause, stated in the Primary Policy and covered thereunder. This Policy is subject to all the same terms and conditions as the Primary Bond &/or Bonds in the Bonding Company of which this Policy pays the excess in so far as the terms and conditions of the Primary Bond &/or Bonds do not conflict with the following specific conditions of this Policy.

Conditions.

3. (a) It is a condition of this Policy that all employees or persons covered hereby shall be bonded in a Bonding Company and it is further understood and agreed that the Underwriters hereon shall be liable only for the losses in respect of any employee &/or person so bonded when the loss exceeds the amount for which such employee or persons is bonded in the Bonding Company and then only for the loss in excess of such Primary Bond.

(b) It is a condition of this Policy that no employee or person covered hereunder

(Testimony of G. L. Crowe.)

shall be bonded in a Bonding Company for a sum of less than \$1,000.

- (c) Warranted free from all claims for losses not discovered within the period of this Policy, and for losses sustained prior to the 1st day of July, 1930, but with the understanding that in the event of non-renewal the Assured shall have the same period of time as provided in the discovery clause in the primary bond following the expiry date of this Policy in which to discover losses which may have occurred between the day named in this warranty and the expiry date of this Policy provided always that such discovery period shall not exceed three years from the expiry date hereof.

Definition.

The term "Bonding Company" as used herein shall be understood to mean an American or "Canadian Bonding Company" or other Bonding Company operating in the United States of America &/or Canada.

4. The premium is based on the understanding that the total number of employees or persons covered at the inception hereof was 125 and that such employees were then bonded as aforesaid for a total sum of \$125,000.

5. Additions or reductions to staff held covered automatically following the underlying American

(Testimony of G. L. Crowe.)

Surety Company on same terms (other than the excess hereunder) subject to final adjustment of premium on expiry. Such adjustment of premium to be calculated at 100% (One Hundred Per Cent) of the additional or return premium payable in connection with the Primary Bond &/or Bonds.

LIST OF EMPLOYEES TO BE BONDED
AS AT APRIL 1, 1939

BALFOUR, GUTHRIE & CO. LIMITED

No.		No.	
1	William N. Pattullo	102	Arthur G. Mills
2	James M. Angus	116	Florence H. Johnson
4	Andrew M. Chrystall	119	John Andrews
5	James A. Dick	120	John Campbell
7	Louis M. Dillon	121	G. L. Crowe
8	William H. Ellis	122	Rachel Dickson
10	Arthur U. Howatt	123	Emily Dwyer
12	Donald C. Marshall	125	A. Runciman
13	Robert F. Shepherd	145	Arthur J. Dickson
17	Edgar F. Wood	147	Dugald W. L. MacGregor
20	C. V. Vosper	148	John B. W. Lawson
47	George R. Martin	152	John B. Hanton, Jr.
48	Thos. R. McElvogue	153	Donald E. Garvin
51	Stanley R. Sorensen	154	Robert G. S. Atkinson
52	John B. Strang	157	Roy Stanley T. Fowler
57	Hugh Russell	158	William H. Harvey
79	D. S. Cameron	159	Joseph O. Higgins
80	Kathleen E. Walker	161	William A. Ehelebe
83	Lansing Laidlaw	178	John F. Gagan
90	Marguerite Dickson	180	Donald S. Cameron, Jr.
91	Albert E. Jones	181	Peter Morgan Street
98	Bayfield R. Pooley		

(Testimony of G. L. Crowe.)

CROWN MILLS

15	Ralph Thomas	54	William L. White
16	H. A. Brock	55	George V. Jensen
19	Frank B. Larsh	95	Mary E. Deibert
23	James B. Brophy	96	William M. Mack
24	John P. Carney	99	Edward C. Snipes
25	George Clark	100	John R. O'Connor
26	William H. Anders	105	Darrell Gillespie
27	T. Baracco	106	Leslie V. Barklow
28	Carl F. Bunsen	107	James H. Mills
29	Herbert Denman	111	Alfred G. Mathies
30	William Griffin	117	Alexander J. Beauvais
31	Wm. K. Metler	125	L. J. Amer
32	Theodore D. Walker	127	C. A. Dykeman
33	Robert B. Strang	129	A. G. Pallant
34	Ray P. Miller	130	M. Grimm
35	P. G. Callison	134	Fred E. Baker
36	W. A. Mattice	135	Peter Baracco
39	Thomas H. Clark	136	Everett M. Fawver
40	C. C. Lamb	137	Frank B. Haskins
41	Homer Worden	138	C. E. Stephens
42	Claude C. Hall	139	Ziba L. Stockdale
45	Christian Kisky	166	Dan O. Smith
46	Ernest G. Laasch	167	Lloyd B. Smyth
50	Joseph E. Snipes	177	John Baecher
53	George Walker	182	Douglas Lindsay Stewart

Page 2

LIST OF EMPLOYEES TO BE BONDED

AS AT APRIL 1, 1939

INTERIOR WAREHOUSE CO.

58	William Sutherland	88	Robert B. Franklin
60	James W. Imlay	103	Cornett Green
61	James P. Todd	113	L. H. Irving
62	Guy C. Foster	114	Louise Irving
63	Pulaski Henning	140	George P. Miller
64	Frank A. Darnielle	155	Elmer Griffith
67	Chas. C. Elledge	164	Alan T. Mills
69	Walter C. Bumgarner	170	Albert Fox
72	F. N. Alexander	171	James Leroy Lamb
73	Frank Hatcher	172	Alta B. Snider
81	Arthur A. Marvel	179	Verne W. Walker
85	Robert H. McKean		

(Testimony of G. L. Crowe.)

COOS FEED & SEED STORES

104	James D. Gillespie	
108	Dewey S. Kollar	
112	Dan Barklow, Jr.	
131	Spencer Ward	
132	E. D. Hufford	
144	Rural L. Griffin	
146	Agnes I. Gillespie	
173	Frank Jameson	
176	Melvin H. Drews	
Total —		
	Balfour Guthrie & Co.....	43
	Crown Mills	50
	Interior Warehouse Co.....	23
	Coos Feed & Seed Stores.....	9
		<hr/>
		125

It is hereby declared and agreed that the domicile or domiciles of the Company and its affiliated Proprietary parent or subsidiary corporations or partnerships are as follows:—

Balfour, Guthrie and Co., Ltd., 733, South West Oak Street, Portland, Oregon.

Crown Mills.,—733, South West Oak Street & 1362, North West Front Avenue, Portland.

Coos Feed and Seed Stores.—320, Front Street, Coquille, Oregon. 700, South Broadway, Marshfield, Oregon. 28, Fifth Street, Myrtle Point, Oregon.

Interior Warehouse Company.—733, South West Oak Street, Portland, Oregon.

during the period commencing with the 1st of April, 1939, and ending with the 1st of April, 1940, both days at noon.

If the Assured shall make any claim knowing the same to be false or fraudulent, as regards amount

(Testimony of G. L. Crowe.)

or otherwise, this Policy shall become void, and all claim thereunder shall be forfeited.

Now Know Ye, that We the Underwriters do hereby bind Ourselves, each for his own part, and not one for Another, our Heirs, Executors, and Administrators, to pay or make good to the Assured or to the Assured's Executors, Administrators, and Assigns, all such Loss or Damage as aforesaid as may happen to the subject matter of this Insurance, or any part thereof during the continuance of this Policy; not exceeding the Sum of

Twenty Five Thousand United States Dollars.
such payment to be made within Seven Days after such loss is proved and that in proportion to the several Sums by each of Us subscribed against our respective Names not exceeding the several Sums aforesaid.

In Witness whereof We, Underwriting Members of Lloyd's, have subscribed our Names and Sums of Money by Us insured.

Dated in London, the 18th Day of May, One Thousand Nine Hundred and Thirty Nine.

CANCELLATION CLAUSE.

(Approved by Lloyd's Underwriters' Fire and Non-Marine Association.)

This Policy may be cancelled at any time at the request of the Assured in writing to the Broker who effected the insurance, and the premium hereon

(Testimony of G. L. Crowe.)

shall be adjusted on the basis of the Underwriters receiving or retaining the customary short term premium.

This Policy may also be cancelled by or on behalf of Underwriters by Ten days' notice given in writing to the Assured at his last known address, and the premium hereon shall be adjusted on the basis of the Underwriters receiving or retaining pro rata premium.

Notice shall be deemed to be duly received in the course of post if sent by pre-paid letter post properly addressed.

Printed at Lloyd's, London, England, 2/12/35.

Mr. Jones: Pre-Trial Exhibit No. 10 is the claim of Balfour, Guthrie & Company against the American Surety Company, with the same admission and the same reservation.

Mr. Wood: I take it that this is offered only to show a claim as made, and not in the nature of the declaration of fraud, and so on.

Mr. Jones: It is for that and the assignment, primarily, at the bottom.

Mr. Wood: To show the fact that the claim was made——

Mr. Jones (Interrupting): That the claim was made, and there is a subrogation assignment on the bottom of the document.

Mr. Wood: But the statements in the claim that there were forgeries, you don't claim that to be substantive evidence?

(Testimony of G. L. Crowe.)

Mr. Jones: Oh, no.

Mr. Wood: No objection to it with that understanding.

Mr. Jones: That was received?

The Court: Yes.

(The form of claim heretofore marked Plaintiffs' Pre-Trial Exhibit No. 10 was thereupon received in evidence.)

Mr. Jones: Pre-Trial Exhibit No. 11 is a carbon copy of a claim of Balfour, Guthrie & Company against Lloyd's, with the same admission and the same reservation.

Mr. Wood: To that there is no objection. [75]

Mr. Jones: And it goes in for the same purpose as the last one.

Mr. Wood: No objection.

The Court: Admitted.

(The claim of Balfour, Guthrie & Company heretofore marked Plaintiffs' Pre-Trial Exhibit No. 11 was thereupon received in evidence.)

Mr. Jones: Pre-Trial Exhibit 12 is the Durham & Bates check for \$5542.43 which was made on behalf of Lloyd's in payment of that amount of their loss, and it had a similar admission with a similar reservation.

Mr. Wood: There is no objection with that understanding.

The Court: Admitted.

(Testimony of G. L. Crowe.)

(Canceled check dated August 3, 1939 of Durham & Bates to Balfour, Guthrie & Co. Ltd. in the amount of \$5542.43, heretofore marked Plaintiffs' Pre-Trial Exhibit No. 12 was thereupon received in evidence.)

Mr. Jones: In making the check they were \$10 short, and Pre-Trial Exhibit No. 13 is a check for the same purpose and it has the same admissions and reservations.

Mr. Wood: With that understanding there is no objection.

The Court: Admitted.

Mr. Jones: What do you mean, "with that understanding"?

Mr. Wood: That you don't claim any substantive statements [76] in there. We admit the check——

Mr. Jones (Interrupting): As evidence of the payment of that amount of money?

Mr. Wood: Yes.

(Canceled check dated August 4, 1939 of Durham & Bates to Balfour, Guthrie & Co. Ltd. in the amount of \$10.00, heretofore marked Plaintiffs' Pre-Trial Exhibit No. 13 was thereupon received in evidence.)

Mr. Jones: Pre-Trial Exhibit No. 13-A, a check from the American Surety Company, was part of the loss, with the same admission and reservation.

Mr. Wood: With that understanding, no objection.

(Testimony of G. L. Crowe.)

The Court: Admitted.

(Canceled check dated June 7, 1939 from American Surety Company of New York to Balfour, Guthrie & Co., Limited in the amount of \$1,000, heretofore marked Plaintiffs' Pre-Trial Exhibit No. 13-A, was thereupon received in evidence.)

Mr. Jones: We are offering in evidence Pre-Trial Exhibit No. 14, which is an assignment of Lloyd's portion of the loss to E. L. McDougal, and it had the same admission and the same reservation.

Mr. Wood: No objection.

The Court: Admitted. [77]

(The assignment, heretofore marked Plaintiffs' Pre-Trial Exhibit No. 14, was thereupon received in evidence.)

PLAINTIFF'S EXHIBIT No. 14

Whereas, Lloyd's of London issued their policy of insurance form J (a) No. N36882, dated May 3, 1938, and prior policies and subsequent policy form J (a) No. N44987 and renewals in effect throughout the term of employment hereinafter mentioned, to Balfour, Guthrie & Co., Limited, et al, including its wholly-owned subsidiary, Interior Warehouse Company, hereinafter called the Employer, for a loss in the sum of Five Thousand Five Hundred Fifty-Two and 43/100ths Dollars (\$5,552.43), being the excess over liability in the sum of One Thousand Dollars (\$1,000.00) carried on the employee hereinafter named by the American Surety

(Testimony of G. L. Crowe.)

Company of New York, London Lloyd's liability being for the excess of loss above said One Thousand Dollars (\$1,000.00) primary liability of the American Surety Company of New York;

Whereas, the following is a detailed statement of said loss resulting from the default of said Garth Lewis Crowe, employee, 3437 S. E. Ankeny, Portland, Oregon, employed as bookkeeper from August 13, 1934, to May 2, 1939, in a net loss of \$6,552.43:

Amount of funds withdrawn covering improper disbursements from the account of Interior Warehouse Company with the Bank of California, N. A., Portland, Oregon, for the period from October 2nd, 1935, to May 2nd, 1939, as shown on page 3 of report thereon, made by Messrs. Price, Waterhouse & Co., public accountants, Portland, Oregon, under date of May 26th, 1939\$6,562.33

Information submitted in support of claim—Report of Messrs. Price, Waterhouse & Co., dated May 26th, 1939

Confession of G. L. Crowe of conversion of funds of Company to his own use, dated May 3rd, 1939, has been delivered to American Surety Company of New York.

(Paid checks, covering funds improperly withdrawn from Company's bank account, showing irregular endorsements, have been delivered to the Portland office of American Surety Company of New York, in accordance with its letter of May 16, 1939)

Total Loss	\$6,562.33
CREDITS (By salary or commission)	
Total credits	9.90
	<hr/> \$6,552.43

(Testimony of G. L. Crowe.)

Whereas, Lloyd's of London had paid to the said Balfour, Guthrie & Co., Limited, and its wholly-owned subsidiary, the Interior Warehouse Company, the sum of Five Thousand Five Hundred Fifty-Two and 43/100ths Dollars (\$5,552.43), the net loss resulting to the said Employer between October 2, 1935, and May 2, 1939, said payment being by virtue of said policy of insurance and suretyship contract; and

Whereas, the Employer, Balfour Guthrie & Co., Limited, and the Interior Warehouse Company, has assigned and subrogated to Lloyd's of London Employer's right of action in and to each and every item of said loss by an assignment and subrogation agreement;

Now, in consideration of payment of One Dollar (\$1.00) and other good and valuable consideration, Lloyd's of London hereby assigns by virtue of said assignment and subrogation all of its right, title and interest which it may have by virtue of said payment of said claim to E. L. McDougal, Esq., of Portland, Oregon, for collection, hereby empowering said E. L. McDougal, Esq., to collect with or without action any sum or sums that may be due or owing to the said Lloyd's of London or E. L. McDougal, Esq., by virtue of said premises.

In witness whereof we have hereunto set our

(Testimony of G. L. Crowe.)

hands at London, England, this 25th day of October, 1939.

G. SIMMONS & CO.

Per H. B. DORMAN

L. P. LANGTON & CO.

Per B. B. PRESTON

F. R. BUSSELL & CO.

Per H. B. COX

[Endorsed]: Filed Mar. 29, 1941.

Mr. Jones: Pre-Trial Exhibit No. 15 is a copy of Page 32 of the Balfour, Guthrie cash receipts, with the same admission and reservation.

Mr. Wood: No objection.

The Court: Admitted.

(The copy of page of cash receipts, heretofore marked Plaintiffs' Pre-Trial Exhibit No. 15, was thereupon received in evidence.)

Mr. Jones: Pre-trial Exhibit No. 16 is similar sheet and with the same reservation—not of Sheet 32; it is Sheet 33—the same admission and reservation.

Mr. Wood: No objection.

The Court: Admitted.

(The copy of page of cash receipts, heretofore marked Plaintiffs' Pre-Trial Exhibit No. 16, was thereupon received in evidence.)

Mr. Jones: Pre-Trial Exhibit No. 17 is a copy of a tabulation of receipts of Balfour, Guthrie &

(Testimony of G. L. Crowe.)

Company which shows the receipt of a thousand dollars, and with the same reservation.

Mr. Wood: With the same understanding.

The Court: Admitted. [78]

(The tabulation heretofore marked Plaintiffs' Pre-Trial Exhibit No. 17 was thereupon received in evidence.)

Mr. Jones: Pre-Trial Exhibit No. 18 goes to some evidence on behalf of the plaintiffs in support of their position on the diversity of citizenship, the jurisdiction phase of the case. The pre-trial order says: "Printed document bearing heading 'The Bank of California' ", and so forth, "excluding the financial statement therein"—we are claiming nothing under that financial statement; "defendant admitting the authenticity but reserving the right to object on the ground of irrelevancy, incompetency, and immateriality."

Mr. Wood: There is no objection now.

The Court: Admitted.

(The list of officers and financial statement of The Bank of California, dated October 2, 1939, heretofore marked Plaintiffs' Pre-Trial Exhibit No. 18, was thereupon received in evidence.)

Mr. Jones: Now, we also have a stipulation at the top of Page 5 of the pre-trial order to the effect that a certain affidavit by Mr. Munly and an affidavit by myself were admitted as being true—the facts in there as being true. However, the facts

(Testimony of G. L. Crowe.)

therein bear directly on this question of jurisdiction and diversity, and as long as we are reserving the question [79] over to the trial itself I should like to have it made a part of the record by offering them in evidence.

Mr. Wood: There is no objection.

Mr. Jones: May I have the affidavit? I lost out on that once, Judge. They didn't go up one time.

The Bailiff: Do you know the numbers?

Mr. Jones: They are just the affidavits in the file.

The Court: Well, what I was debating in my own mind is whether you would be permitted to argue the case if you put them in that way. Perhaps you had better put in a stipulation.

Mr. Jones: I withdraw the offer for the moment. If I put in my affidavit will you stipulate that I may argue the case?

Mr. Wood: No.

The Court: How is that?

Mr. Jones: He won't permit that.

The Court: I suggest that you stipulate the facts.

Mr. Jones: Let me have the affidavit and I will stipulate the facts. Can we stipulate as to the truth of the facts in that affidavit?

Mr. Wood: Just as facts, without reference to the affidavit.

Mr. Jones: Yes, just as facts.

Mr. Wood: Yes, I will stipulate that the statements in each and both of those affidavits are true.

(Testimony of G. L. Crowe.)

The Court: Read them into the record, not as part of the affidavit, but as statements to which counsel agrees. [80]

Mr. Jones: It is stipulated between counsel in this case that at the time of the institution of this cause and during all the times in the complaint herein specified the Bank of California, National Association, was and continues and since has been a national banking association organized and existing under and by virtue of the national banking laws of the United States of America, with its home office and principal place of business in the City of San Francisco, State of California. During all of said times Article II of the articles of association of the said Bank of California, National Association, provided and still provides as follows: "2nd. The place where its banking house or office shall be located and its operations of discount and deposit carried on and its general business conducted to be the City and County of San Francisco, State of California, with branches at Portland, Multnomah County, Oregon, Seattle, King County, Washington, Tacoma, Pierce County, Washington, and Virginia City, Storey County, Nevada. During all of said times The Bank of California, National Association, has owned and maintained and still owns and maintains a branch at Portland, Multnomah County, State of Oregon, which at all of said times was and still is located in the State of Oregon and transacting business in said state as such

(Testimony of G. L. Crowe.)

branch, and it is further stipulated between counsel for the plaintiffs and the defendant that the defendant became a national banking association prior to the [81] year 1927 by virtue of the laws of Congress then in existence.

The Court: To which counsel agrees?

Mr. Wood: Yes, your Honor.

Mr. Jones: Now, at this time might we have a short recess?

The Court: Court is in recess.

(A recess was then taken, after which proceedings were resumed as follows:)

G. L. CROWE,

resumed the stand as a witness in behalf of the plaintiffs and testified further as follows:

Direct Examination

(Continued)

By Mr. Jones:

Q. Mr. Crowe, the 19 checks that you destroyed were destroyed before the audit, were they not?

A. Yes, sir.

Q. And after they were returned from the bank, and before the audit?

A. That is right.

Q. Did anybody request you to tear them up?

A. No, sir.

Q. That was your own idea?

A. Yes, sir.

(Testimony of G. L. Crowe.)

Mr. Jaureguy: Now, if your Honor please, we re-offer—or rather we now offer in evidence the following portions of Pre-Trial Exhibit 3, all of Pre-Trial Exhibit 3 except the [82] following: On Page 1 the first portion of the second paragraph reading as follows: “Following the acknowledgment made to us by Mr. G. L. Crowe that there were irregularities in the accounts kept by him for Interior Warehouse Company.”

Page 3, the third paragraph starting, “During the course of our examination”, and ending with the figure “\$6,562.33,” the last paragraph of the introductory portion, being at the bottom of Page 3 and the top of Page 4 to be excluded; the “Yours very truly” and signature, however, to be included.

On Exhibit A the notation at the end of the second paragraph, “The endorsements on the checks listed do not correspond with the signatures of the employees.” A similar notation at the end of the third paragraph, and a similar notation at the end of the fourth paragraph.

On Schedule 2——

The Court (Interrupting): I think you have missed one, Mr. Jaureguy.

Mr. Jaureguy: Oh, yes, at the end of the sixth paragraph, a similar notation to be excluded.

Schedule 2, the notation in parentheses following the heading, “The endorsements on the checks listed do not correspond with the signatures of the employees.”

(Testimony of G. L. Crowe.)

The next page, Schedule 3, a similar notation in parentheses at the end of the title.

Schedule 4, a similar notation in parentheses at the [83] end of the title.

Schedule 5, the third line of the title, the words in parentheses, "possibly destroyed", and the notation in parentheses at the end of the tabulation beginning, "The carbon copy of the numbered check", and ending with the words, "Showed the same payee." That is to be excluded.

Schedule 6, the words in parentheses at the end of the title, "The endorsements", and so on in parentheses, excluded. About two-thirds of the way down, in capital letters, the following to be excluded: "Check negotiated in Portland which had been written for services performed at Walla Walla."

All of Exhibit B to be excluded.

Mr. Wood: We renew our objection, your Honor. There are still a lot of matters in there—on the very face of it it says, "Covering improper disbursements", and on the initial page, "improper withdrawals", "improper disbursements", and again at the top of Page 3, the five different methods used by Crowe. There is still a lot of objectionable matter in it, your Honor, tabulations and computations, We renew our objections.

The Court: Well, some of these tabulations certainly are competent to explain records that are in

(Testimony of G. L. Crowe.)

the possession of the Court. I don't want to put the burden on you, Mr. Wood, but how much of that do you think could go in?

Mr. Wood: I rather think on the face, your Honor, in addi- [84] tion to what Mr. Jaureguy said, "covering improper disbursements" should be deleted. "Statement of funds withdrawn from the account with the bank", that would be all right. Then on the first page, a letter addressed to Mr. MacGregor, the word "improper" in the fourth line and the words "as improper disbursements" in the seventh line I would think should come out. The part on Page 2 based on their own investigation seems objectionable.

The Court: Well, there is testimony in the record to show that it could be based entirely on the record.

Mr. Wood: Yes, that is true.

The Court: So in view of that I think that could stand.

Mr. Wood: At the top of Page 3 it seems to me those are conclusions which ordinarily the trier of the fact——

The Court (Interrupting): You mean "Schedule 1" or the other?

Mr. Wood: At the very start of the five methods, and again on that page the next to the last paragraph, "improper disbursements."

The Court: Well, that has all been excluded.

Mr. Wood: Then on "A" reference is made, "covering improper disbursements." The Court it-

(Testimony of G. L. Crowe.)

self thought Schedule 1 objectionable, and 2 and 3.

The Court: Well, that related to specific matters that I called attention to, for instance, that in parentheses which [85] Mr. Jaureguy has now indicated that he would eliminate. How about those starred notations at the bottom of Schedules 3 and 4? As a matter of fact I am not sure I know what that means, the starred notations to the effect that "in these instances cash advances had been made; final settlement for each period being effected by check mailed from Portland." Is that part of the record? Where was that information obtained?

Mr. Jaureguy: I can find out, your Honor. The information contained in those notations was obtained from the records, your Honor.

The Court: With the eliminations that have been made by both sides the document will be admitted.

(The statement of funds withdrawn, heretofore marked Plaintiffs' Pre-Trial Exhibit No. 3, was thereupon received in evidence.)

(Testimony of G. L. Crowe.)

PLAINTIFF'S EXHIBIT 3

Interior Warehouse Company

STATEMENT OF FUNDS WITHDRAWN
FROM THE ACCOUNT WITH THE BANK
OF CALIFORNIA, N. A., PORTLAND, OR-
EGON, FOR THE PERIOD FROM SEP-
TEMBER 1, 1935 TO MAY 2, 1939

PRICE, WATERHOUSE & CO.

American Bank Building

Portland, Oregon

May 26, 1939

Mr. D. W. L. MacGregor, Vice-President,
Balfour, Guthrie & Co., Limited,
733 S. W. Oak Street,
Portland, Oregon.

Dear Sir:

In accordance with your instructions we have made an investigation of the books and accounts of Interior Warehouse Company, a wholly owned subsidiary of Balfour, Guthrie & Co., Limited, for the purpose of determining the amount of certain withdrawals from the Company's account with The Bank of California, N. A., Portland, Oregon, which occurred in the period from September 1, 1935 to May 2, 1939. We have attached, as Exhibit A, a statement of funds withdrawn from the Company's bank account and have submitted on schedules 1 to 6 lists of the individual items covering the various

(Testimony of G. L. Crowe.)

types of disbursements enumerated on Exhibit A.

, we inspected the endorsements on the paid checks for the period from September 1, 1935 to May 2, 1939 for the purpose of ascertaining whether any of the endorsements appeared spurious. Where such was the case, we satisfied ourselves by examination of other records that the disbursement was irregular. We also checked the charges on the Company's bank statements for this period for the purpose of determining whether all charges were supported by paid checks in the possession of the Company. Where no paid checks were available, it appeared from the data obtained relative thereto and from the entries made on the books in connection with such disbursements that the transactions were irregular.

Our investigation included an accounting for all checks and drafts paid by the bank for the period from September 1, 1935 to May 2, 1939. Paid checks were traced to the dock payrolls and country agents' reports. Comparisons were made of the original dock payroll reports with the dock office copies of such reports and of the originals of the country agents' payroll reports at the head office (with minor exceptions) with the copies which were obtained from the agents at the various country stations. The country agents' copies of their expense reports were also inspected, where available. The monthly summaries prepared at Portland to

(Testimony of G. L. Crowe.)

record the distribution of the charges to the accounts in the general ledger were reviewed, including the distribution of miscellaneous expenses paid by check. Test checks were made of certain of the records to ascertain whether there were irregularities in the accounts during the year prior to October 2, 1935, the date of the first transaction listed on the attached schedules. Our test check of the recording of miscellaneous cash receipts received from country agents indicated that the amounts shown on the agents' copies of their reports were properly recorded at the head office.

The various classes of transactions are explained in the summary shown on Exhibit A. The methods used in recording the contra entries required to keep the books in balance did not necessarily follow the same grouping. The entries used to cover the irregularities were made in the following manner:

Schedule 1 shows two groups of transactions; (1) the items payable to names appearing on the payroll where the records inspected did not indicate that an authentic employee of the name used had been employed during the period under review, and (2) irregular checks payable to names appearing on the payroll where the records inspected indicated that an authentic employee of the name used had previously been employed.

Based on our investigation, it appears that the funds withdrawn as improper disbursements from the Company's bank account from October 2, 1935

(Testimony of G. L. Crowe.)

to May 2, 1939 amount to \$6,562.33. As previously stated, particulars are shown on Exhibit A and the supporting Schedules 1 to 6.

Yours very truly,

PRICE, WATERHOUSE & CO.

EXHIBIT A

INTERIOR WAREHOUSE COMPANY STATEMENT OF FUNDS WITHDRAWN COVERING IMPROPER DISBURSEMENTS FROM THE ACCOUNT WITH THE BANK OF CALIFORNIA, N. A., PORTLAND, OREGON, FOR THE PERIOD FROM SEPTEMBER 1, 1935 TO MAY 2, 1939

Checks negotiated in Portland which had been made payable to names inserted on the dock payroll, such names not appearing on the carbon copy of the payroll retained at the dock office where the payroll had been prepared. (Schedule 1)	\$1,245.82
Checks negotiated in Portland which had been written payable to employees listed on the dock payroll, such employees actually having been paid by other checks or in cash. (Schedule 2)	369.59
Checks negotiated in Portland which had been written payable to country employees who were actually paid by other checks drawn in Portland (six exceptions noted). (Schedule 3)	2,478.01
Checks negotiated in Portland which had been written payable to country employees who were actually paid by drafts issued by country agents (two exceptions noted). (Schedule 4)	1,462.15
Amounts charged by the bank on the Company's bank statements showing payments where paid checks as evidence thereof are not available (possibly destroyed) and Company's carbon copies of the numbered checks indicate, (1) that the items were in payment for services which were paid for by other checks or drafts, or (2) that the checks had been voided after their preparation. (Schedule 5)	950.39

(Testimony of G. L. Crowe.)

Checks negotiated in Portland which had been written payable to an employee in reimbursement of a petty cash fund, where employee had actually received reimbursement from another source. (Schedule 6)	48.77
Check negotiated in Portland which had been written for services performed at Walla Walla. (Schedule 6)	7.60
(The address used with the endorsement corresponds with the address on certain checks listed on Schedule 4.)	

Total	<u>\$6,562.33</u>
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Schedule 1.

INTERIOR WAREHOUSE COMPANY

LIST OF CHECKS NEGOTIATED IN PORTLAND WHICH HAD BEEN MADE PAYABLE TO NAMES INSERTED ON THE DOCK PAYROLL, SUCH NAMES NOT APPEARING ON THE CARBON COPY OF THE PAYROLL RETAINED AT THE DOCK OFFICE WHERE THE PAYROLL HAD BEEN PREPARED.

Payable to names appearing on the payroll where the records inspected did not indicate that an authentic employee of the name used had previously been employed:

Date	Check Number	Payee	Amount
Apr. 21, 1939	5117	C. Warren	\$ 41.55
Feb. 24, 1939	4653	C. Clarkson	42.00
Sept. 8, 1938	3536	C. W. Clark	46.78
Sept. 1, 1938	3461	C. W. Clark	42.57
Aug. 26, 1938	3423	C. W. Clark	47.77
Aug. 19, 1938	3383	C. W. Clark	51.97
July 22, 1938	3184	C. W. Clark	34.15
June 30, 1938	3059	C. W. Clark	42.17
June 23, 1938	3039	C. W. Clark	33.24
June 9, 1938	2978	C. W. Clark	33.86
May 27, 1938	2886	C. W. Clark	28.84
May 19, 1938	2877	C. W. Clark	28.81

(Testimony of G. L. Crowe.)

Date of Issue	Check Number	Name of Payee	Amount
May 13, 1938	2852	C. W. Clark	29.70
Apr. 21, 1938	2770	C. W. Calrk	36.66
Apr. 14, 1938	2728	C. W. Clark	49.99
Mar. 25, 1938	2586	L. G. Cross	33.73
Mar. 11, 1938	2473	C. W. Clark	36.33
Feb. 17, 1938	2337	C. W. Clark	36.38
Feb. 10, 1938	2292	C. W. Clark	45.79
Jan. 20, 1938	2125	C. W. Clark	37.97
Jan. 13, 1938	2094	A. R. Reed	31.98
Total.....			<u>\$ 812.24</u>

Payable to names appearing on the payroll where the records inspected indicated that an authentic employee of the name used had previously been employed:

Dec. 23, 1937	1950	C. W. Carey	\$ 35.64
Dec. 16, 1937	1925	C. W. Carey	37.15
Dec. 10, 1937	1871	C. W. Carey	31.60
Dec. 3, 1937	1807	C. W. Carey	41.58
Nov. 18, 1937	1625	C. W. Carey	50.54
Nov. 11, 1937	1532	C. W. Carey	30.79
Nov. 4, 1937	1479	C. W. Carey	33.66
Oct. 28, 1937	1369	C. W. Carey	35.64
Oct. 21, 1937	1344	C. W. Carey	34.38
June 24, 1937	713	B. Stewart	30.94
Nov. 15, 1936	B15889	R. Mcayearl	41.66
Dec. 31, 1935	B15007	J. Moore	30.00
Total.....			<u>\$ 433.58</u>

Total carried to Exhibit A.....\$1,245.82

(Testimony of G. L. Crowe.)

Schedule 2

INTERIOR WAREHOUSE COMPANY

LIST OF CHECKS NEGOTIATED IN PORTLAND WHICH
HAD BEEN WRITTEN PAYABLE TO EMPLOYEES
LISTED ON THE DOCK PAYROLL, SUCH EM-
PLOYEES ACTUALLY HAVING BEEN PAID BY
OTHER CHECKS OR CASH

Date	Check Number	Payee	Amount
Jan. 27, 1939	4339	W. B. Farthing	\$ 42.75
Oct. 21, 1938	3698	W. H. Hemming	30.63
July 23, 1937	811	F. Franz (payroll shows name of L. Franz)	15.05
July 23, 1937	792	A. Stoutenburgz (payroll shows name of A. Stoutenburg) (endorse- ments include G. L. Crowe)	40.99
July 1, 1937	723	R. P. Rawls	31.98
May 20, 1937	617	A. Stoutenburg	42.12
Apr. 22, 1937	505	W. H. Hemming	33.62
Oct. 29, 1936	B15857	J. Fenton	24.30
Oct. 22, 1936	B15816	R. McAyeal	52.95
Sept. 17, 1936	B15670	A. Wright	31.20
Sept. 10, 1936	B15620	E. Foss	24.00
Total carried to Exhibit A.....			<u>\$369.59</u>

(Testimony of G. L. Crowe.)

Schedule 3

INTERIOR WAREHOUSE COMPANY

LIST OF CHECKS NEGOTIATED IN PORTLAND WHICH
HAD BEEN WRITTEN PAYABLE TO COUNTRY EM-
PLOYEES WHO WERE ACTUALLY PAID BY OTHER
CHECKS DRAWN IN PORTLAND (WITH SIX EX-
CEPTIONS NOTED)

Date	Check Number	Payee	Amount
Apr. 3, 1939	4996	C. C. Elledge	\$ 99.00
Jan. 6, 1939	4233	W. C. Bumgarner (en- dorsements include G. L. Crowe)	128.70
Jan. 6, 1939	560	W. C. Bumgarner (en- dorsements include G. L. Crowe)	40.11
Nov. 14, 1939	3895	J. A. Frischknecht	49.50
Nov. 1, 1938	3749	Roy Lamb	89.10*
Oct. 15, 1938	3691	J. A. Frischknecht	49.50
Aug. 15, 1938	3373	J. A. Frischknecht	49.50
July 14, 1938	3156	J. A. Frischknecht	49.50
July 5, 1938	3126	F. A. Darnielle	50.00
June 3, 1938	2944	C. C. Elledge	74.25
May 2, 1938	2812	Roy Lamb	84.15*
Feb. 15, 1938	2330	J. A. Frischknecht	49.50
Feb. 2, 1938	2259	C. C. Elledge	74.25
Jan. 15, 1938	2113	J. A. Frischknecht	49.50
Dec. 15, 1937	1909	J. A. Frischknecht	49.50
Dec. 6, 1937	1845	P. Henning	60.00
Nov. 15, 1937	1612	J. A. Frischknecht	49.50
Nov. 1, 1937	1453	C. C. Elledge	74.25
Oct. 4, 1937	1243	Roy Lamb	88.70
Sept. 30, 1937	1255	C. G. Starr	74.25
Sept. 15, 1937	1140	J. A. Frischknecht	49.50
Sept. 3, 1937	1118	C. C. Elledge	74.25
Aug. 14, 1937	942	J. A. Frischknecht	49.50

(Testimony of G. L. Crowe.)

Date	Check Number	Payee	Amount
Aug. 4, 1937	860	C. G. Starr	74.25
July 15, 1937	765	J. A. Frischknecht	49.50
July 2, 1937	742	W. C. Bumgarner	123.75
June 3, 1937	657	Roy Lamb	79.20*
May 4, 1937	575	Roy Lamb	49.20
May 3, 1937	549	C. C. Elledge	74.25
Apr. 1, 1937	429	Roy Lamb	79.20*
Mar. 3, 1937	139	Roy Lamb	79.20*
Feb. 2, 1937	A10753	Roy Lamb	79.20*
Jan. 4, 1937	A10680	J. A. Frischknecht	50.00
Nov. 3, 1936	A10598	P. Henning	60.00
Oct. 15, 1936	A10552	J. A. Frischknecht	50.00
Oct. 3, 1936	A10547	C. C. Elledge	74.25
Sept. 15, 1936	A10479	J. A. Frischknecht	50.00

Total carried to Exhibit A	\$2,478.01
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* In these instances cash advances had been made; final settlement for each period being effected by check mailed from Portland.

Schedule 4

INTERIOR WAREHOUSE COMPANY

LIST OF CHECKS NEGOTIATED IN PORTLAND WHICH
HAD BEEN WRITTEN PAYABLE TO COUNTRY
EMPLOYEES WHO WERE ACTUALLY PAID BY
DRAFTS ISSUED BY COUNTRY AGENTS (WITH
TWO EXCEPTIONS NOTED)

Date	Check Number	Payee	Amount
Mar. 3, 1939	4726	Dick Sperry	\$ 28.51
Mar. 3, 1939	4725	Henry Robertson	31.68
Mar. 3, 1939	4724	Ed. Thorpe	76.03
Feb. 2, 1939	4409	Ed. Thorpe	79.20
Feb. 2, 1939	4408	Dick Sperry (endorsements include Garth Crowe)	4.75

(Testimony of G. L. Crowe.)

Date	Check Number	Payee	Amount
Jan. 4, 1939	4223	Ed. Thorpe	82.37
Oct. 3, 1938	3650	M. Fennimore	78.41
Sept. 6, 1938	3512	Fred Mutt (endorsements include G. L. Crowe)	56.43
Sept. 6, 1938	3511	C. H. Peters (endorsements include G. L. Crowe)	130.68
Aug. 2, 1938	3266	Kemper Snow (endorsements include G. L. Crowe)	33.66
Aug. 2, 1938	3265	Joe Green (endorsements include G. L. Crowe)	123.75
Aug. 2, 1938	3264	Ed. Thorpe	123.75
June 1, 1938	2920	Roy Lamb	84.15*
Apr. 5, 1938	2701	J. E. Flor	50.23
Apr. 2, 1938	2687	Ed. Thorpe	90.68
Feb. 1, 1938	2240	Robt. Stilson	25.24
Jan. 3, 1938	2035	Roy Lamb	84.15*
Sept. 2, 1937	1064	L. G. Speck	80.19
Aug. 3, 1937	849	M. Fennimore	59.40
Sept. 3, 1936	A10451	E. J. Ricker	70.09
Oct. 2, 1935	A9880	M. N. Mellick	20.00
Oct. 2, 1935	A9879	Ed. Mellick	20.00
Oct. 2, 1935	A9878	N. A. Campbell	28.80
Total carried to Exhibit A			<u>\$1,462.15</u>

* In these instances proper payment had been made to the employee in a combination of drafts, check and cash.

(Testimony of G. L. Crowe.)

Schedule 5

INTERIOR WAREHOUSE COMPANY

LIST OF AMOUNTS CHARGED BY THE BANK ON THE COMPANY'S BANK STATEMENTS SHOWING PAYMENTS WHERE PAID CHECKS AS EVIDENCE THEREOF ARE NOT AVAILABLE AND COMPANY'S CARBON COPIES OF THE NUMBERED CHECKS INDICATE THAT THE ITEMS WERE IN PAYMENT FOR SERVICES PAID FOR BY OTHER CHECKS OR DRAFTS OR THAT THE CHECKS HAD BEEN VOIDED AFTER THEIR PREPARATION

Date	Check Number	Payee	Amount
Dec. 5, 1938	4016	C. C. Elledge	\$ 99.00
Dec. 2, 1938	4004	Ed. Thorpe	76.03
Dec. 2, 1938	4003	Dick Sperry	11.09
Dec. 1, 1938	3965	Roy Lamb	89.10
Nov. 2, 1938	3762	Dick Sperry	34.16
Nov. 2, 1938	3761	Kemper Snow	87.12
Nov. 2, 1938	3760	Ed. Thorpe	120.78
Aug. 31, 1938	3499	J. W. Bradley	17.82
Aug. 31, 1938	3496	John Klamert	8.91
Aug. 31, 1938	3483	John Klamert	60.38
Dec. 10, 1936	B15920	W. H. Hemming	25.50
Dec. 1, 1936	A10622	Roy Lamb	80.00
Aug. 27, 1936	B15566	F. N. Alexander	43.20
Aug. 3, 1936	A10346	J. A. Frischknecht	50.00
July 9, 1936	B15367	A. Rieman	14.40
July 3, 1936	A10323	P. Henning	49.50
July 1, 1936	A10292	Roy Lamb	19.50
June 18, 1936	B15340	G. Edmonson	14.40
May — 1936	A10230	—	49.50
Total carried to Exhibit A			<u>\$950.39</u>

(Testimony of G. L. Crowe.)

Schedule 6

INTERIOR WAREHOUSE COMPANY

LIST OF CHECKS NEGOTIATED IN PORTLAND WHICH
HAD BEEN WRITTEN PAYABLE TO AN EMPLOYEE
IN REIMBURSEMENT OF A PETTY CASH FUND,
WHERE EMPLOYEE HAD ACTUALLY RECEIVED
REIMBURSEMENT FROM ANOTHER SOURCE

Date	Check Number	Payee	Amount
Sept. 30, 1937	81	Frank D. Hatcher (endorsements include G. L. Crowe)	\$23.86
Sept. 30, 1936	A10485	Frank Hatcher	24.91
Total carried to Exhibit A			<u>\$48.77</u>
Date	Check Number	Payee	Amount
Jan. 4, 1937	A10689	R. W. Umbarger	\$7.60
Total carried to Exhibit A			<u>\$7.60</u>

The Court: Now, as to procedure, another copy should be run.

Mr. Jaureguy: Your Honor, I wonder if I might make an inquiry here. Counsel made the remark that he thought your Honor had said that Schedules 1, 2, and 3 were improper. I don't know whether your Honor is excluding those.

The Court: No, I limited that by saying only as to certain remarks which appeared, which you already had eliminated. Those are the things that I am excluding, the remarks at the top of the page in parentheses. Well, I don't know whether I called attention to Schedule 1. [86]

Mr. Jaureguy: I understand your Honor to say

(Testimony of G. L. Crowe.)

that that was proper, but apparently counsel understood you to say it was improper.

The Court: No, I think I said it was proper. Now as to the procedure, will counsel substitute a copy of this with the eliminations made?

Mr. Jaureguy: We are willing to proceed in either way Court or counsel desires, either to eliminate it by obliteration or substituting a copy.

The Court: As far as this Court is concerned it doesn't make any difference. I am simply excluding these remarks so that no one else will think that I was influenced by the auditor's testimony on the matter.

Mr. Jaureguy: If it is satisfactory to the Court counsel will get together and obliterate the parts that were excluded.

The Court: All right.

Mr. Jaureguy: I take it that we don't need to have the consent of the Court on each part obliterated.

The Court: No, I am making the rulings now. I am admitting it with those exceptions, and so far as I am concerned if you just mark on there "Not admitted" or something of that sort it will be satisfactory to me. I am not going to consider it anyhow.

Mr. Jaureguy: If we are not agreed among ourselves what the Court said but can agree that certain parts can be obliterated that is all right with your Honor? [87]

The Court: Yes. I think the record is perfectly clear on it.

(Testimony of G. L. Crowe.)

Mr. Jaureguy: Yes, I think so too.

Mr. Jones: You may cross-examine.

Cross-Examination

By Mr. Wood:

Q. Mr. Crowe, as to those 19 checks the originals of which you destroyed, you say you destroyed them before the audit. Do you mean the audit of May, 1939? A. Yes.

Q. How long before that audit did you destroy those 19 checks?

A. I couldn't answer that question without seeing the checks themselves. They were destroyed shortly after they came back from the bank.

Q. Will you look at the carbon copies of those checks here in evidence? That is No. 2. You find, do you not, that the checks began in May of '36 and ran through June, July, August, and December of that year, and none was in 1937, but they began again in August of '38, and November of '38, and December of '38? Is that correct? A. Yes.

Q. Now did you destroy all those 19 checks at one time or at separate times?

A. At separate times, probably two and three at a time.

Q. Two and three at a time, at separate times?

[881

A. Yes.

Q. So that there would be about six or more occasions that you destroyed parts of 19 checks?

A. That would be an estimate.

(Testimony of G. L. Crowe.)

Q. Three into 19 would be about six different occasions? A. Yes.

Q. Now would the destruction occur the month following the return of the checks from the bank to the Interior?

A. Will you state the question again, please?

Q. For instance, take November of '38; there appeared to have been three checks in that month. The canceled checks, the paid checks, would come back to the Interior with the bank statement about December 1st of '38, would they not? A. Yes.

Q. And would you not destroy those particular checks shortly thereafter? A. Yes.

Q. And that was the method you used on all 19 of them? A. Yes.

Q. They were destroyed not long after the bank sent them back to the Interior? A. Yes.

Q. Now you were the man who got all of the paid checks of the Interior back from the defendant bank, were you not? A. Yes, sir. [89]

Q. Did you call each month at the bank and get those?

A. I did after a certain date. I don't recall what date I started doing that, but I did for a period of at least two years.

Q. At least two years, and before that somebody else got them from the bank? A. Yes.

Q. But when they came back from the bank, even when somebody else got them, you had access to them? A. That is right.

(Testimony of G. L. Crowe.)

Q. And they were really delivered to you, weren't they, by whoever got them from the bank?

A. Yes.

Q. That was part of your duties to have charge of these paid checks? A. Yes.

Q. And the bank statements accompanying the paid checks? A. Yes.

Q. It was also a part of your duty to draw the checks in the first place—have them drawn by somebody under your supervision?

A. That is right.

Q. Some girl typed them out, did she not?

A. Yes, sir.

Q. And when she typed them out she delivered them to you? [90] A. Yes, sir.

Q. And you would take them to one of the officials of the Interior and have him sign for the maker of the check? Is that right?

A. That is right.

Q. And after the checks were signed by the official of the Interior they were again delivered to you, were they not? A. That is right.

Q. And to no one else? A. That is right.

Q. And that is where the opportunity was given you to take the checks and sign the names of the payees on them? Is that right? A. Yes.

Q. Had you not had access to signing them in that fashion and before delivery to any payee you would not have been able to sign the payee's name?

Mr. Jones: Just a moment; that is objected to as incompetent, irrelevant, immaterial, and calling

(Testimony of G. L. Crowe.)

for a conclusion of the witness on a point that lays solely in the province of the Court.

The Court: Well, it is immaerial one way or the other. I will exclude it.

Q. (By Mr. Wood): Why were the signed checks always delivered back to you? [91] What would you do with them? What would your duties be in connection with these checks?

A. I would check them for their correctness and for the signature and give them to the girl to mail.

Q. Give them to the girl to mail? A. Yes.

Q. That is, as far as the country warehouses were concerned? A. Yes.

Q. But how about the dock? They weren't mailed out? A. No, sir.

Q. Did you personally take those checks down to the dock for distribution to the employees?

A. I may have on one or two occasions, but not as usual thing at all.

Q. How was it usually handled?

A. They were taken down by—I think I am right in saying the office boy.

Q. But on all occasions all checks for the pay-rolls, as well as these 107 checks, plus the 19 missing checks, came back to you after they were signed?

A. Yes.

Q. Was it part of your duties to reconcile the bank statement each month when you received it?

A. Yes, sir.

Q. And did you reconcile it each month? [92]

A. I did.

(Testimony of G. L. Crowe.)

Q. Of course over this period of time from September, '35 to May of '39 these shortages showed on the bank statement? A. No.

Q. They didn't show on the statement?

A. No.

Q. Not in any instance at all?

A. Maybe I didn't understand your question. State it again, please.

Q. We will take specifically these 19 missing checks. Those checks of course were paid by the bank, were they not? A. Yes.

Q. And the bank statement would show that they had been paid? A. That is right.

Q. But on the records of Balfour, Guthrie in some instances you marked on the carbon copy that they were void? A. In some instances, yes.

Q. But that was not true? The checks had actually been paid by the bank, had they not?

A. That is right.

Q. Of course as to those 19 checks, you knew our bank had paid them?

A. What do you mean by "our bank"?

Q. The defendant bank in this case.

A. The Bank of California? [93]

Q. Yes. A. Yes.

Q. That it had paid them?

A. That it had paid them.

Q. Did anybody else make any reconciliation of the bank account besides yourself? A. Yes.

Q. Who? A. Price, Waterhouse.

(Testimony of G. L. Crowe.)

Q. Well, you are speaking now about annual audits? A. Yes.

Q. Did they take all the bank statements each year and reconcile those against your reconciliation?

A. No, not all of them.

Q. Just a portion of them? A. Yes.

Q. In the nature of a test, is that it? They would check for some specific month, or something of that kind? A. Yes.

Q. Now in order to obtain the signatures of the officers to the checks that are in suit here you would lay before the officers the payroll showing the names of those employees and the amounts of the checks, would you not? A. Yes, sir.

Q. And as far as these 107 checks and perhaps the 19 also, those [94] particular payees were not entitled to those checks? A. No, sir.

Q. They hadn't worked for them and hadn't earned that money? Is that correct?

A. Well, they were duplications.

Q. Some of them were? A. Some, yes.

Q. How did the payroll show on those? Did it show those names and those amounts for those checks? A. Yes.

Q. And you had added those names and those amounts yourself? A. In some cases.

Q. Well, every time you asked them to sign checks did the name and amount appear on the payroll sheet? Would they sign a payroll check without the name being on the payroll? A. No.

(Testimony of G. L. Crowe.)

Q. So in each instance the name was on the payroll?
A. Yes, sir.

Q. And the amount was on the payroll?

A. Yes, sir.

Q. And the check corresponded?

A. Yes, sir.

Q. But as to some of these 107 where they were duplications you made those additions to the payroll?
A. Yes, sir. [95]

Q. Well, did that apply both to the dock payroll and the country payroll?
A. Yes.

Q. But at the time those additional names were put on by you you did not add those names or those amounts to the timebook kept by the superintendent at the dock, did you?

A. Not all the time, no.

Q. Did you add any names to the superintendent's timebook?
A. Yes.

Q. How did you have access to the superintendent's timebook?

A. That was an exception.

Q. An exception?
A. Yes.

Q. What does that mean?

A. I didn't have access to the book except as I was delegated to get the book at one particular date and bring it to the office.

Q. For whose inspection? Was it for your or somebody else's inspection?

A. Inspection by Price, Waterhouse.

Q. That was in 1939 for the purpose of that audit made in '39?

(Testimony of G. L. Crowe.)

A. I don't know whether I got that book in 1939 or not.

Q. Did you get it each year when the auditors were auditing? A. Yes.

Q. Each year did you add some names to that original timebook? [96]

A. I don't know whether I did each year or not. I did if my previous actions would justify it.

Q. That is, on every one of these checks on the dock payroll extending over this period from '35 to '39 you always saw that the names of those payees were always put in the superintendent's timebook? A. Oh, no.

Q. How many times did you do that?

A. Not over three times.

Q. About three times?

A. Not over three times.

Q. And that would be just three names? Three times would be three names?

A. I don't know how many names; probably one or two or three names.

Q. Each time? A. Yes.

Q. So that a maximum would be nine names, three times with three names each time?

A. Yes, I would think so.

Q. Did the auditors check those original timebooks in making the audits against these canceled checks?

A. They probably did. That would be part of their duty.

(Testimony of G. L. Crowe.)

Mr. Jaureguy: I move that be stricken as setting forth a conclusion of the witness. The question was all right; it [97] called for something that might be within his knowledge, but when he said, "It probably was their duty" that would be a conclusion of the witness.

The Court: Read me the answer.

(The answer of the witness was read.)

The Court: The answer is stricken.

Q. (By Mr. Wood): On each of the audits made by Price, Waterhouse I take it you worked with them.

A. Yes, I did part of the work.

Q. Was your designation payroll clerk for the Interior? A. Clerk.

Q. Having charge of these books and records for the Interior, you worked with the auditors when they made their audit? A. Yes.

Q. Do you know of your own knowledge whether or not they did make a comparison of the canceled checks and the original timebook of the superintendent of the dock?

A. No, I don't know.

Q. You don't know whether they did that?

A. No.

Q. But in any event, except for these nine names that you say you added to the superintendent's timebook, none of the other checks in issue here would appear on the superintendent's timebook?

A. I didn't understand the question. [98]

(Testimony of G. L. Crowe.)

Q. You say that on about three occasions you added not to exceed three names to the superintendent's timebook? Is that correct?

A. That was an estimate.

Q. That is your best estimate?

A. Yes, sir.

Q. And the superintendent's timebook is an original book where the time of the men is kept by the superintendent? A. Yes.

Q. Except for those nine names added by you, none of the other names represented by the checks in issue here, nor the amounts of the checks, nor the time supporting the amounts of the checks appear in the superintendent's time record?

A. No.

Q. Neither did it appear from the carbon of the payroll kept at the dock, did it?—any of those names? A. No.

Q. You didn't go back there and add names and amounts to the carbon of the payroll sheets at the dock? A. No.

Q. And you didn't add names and amounts to the carbon of the payroll sheets of the country warehouse?

Mr. Jones: If the Court please, I have let this go quite a while. It is considerably beyond the scope of my direct examination and entirely goes to make out Mr. Wood's own case [99] on negligence set forth in his answer. I feel that if he wants to make the witness his for those purposes

(Testimony of G. L. Crowe.)

at this time we have no objection, but it is entirely beyond what we went into, and we object to it on that ground.

The Court: Overruled. However, you will limit the examination. I think that you are spreading out the scope of it to a certain extent.

Mr. Wood: Very well. Was that last question answered, Mr. Reporter?

The Reporter: No, it was not answered.

Q. (By Mr. Wood): Do you remember the question, Mr. Crowe? A. No.

Mr. Wood: Please read it to him.

(The last question was read.)

The Court: He may answer.

A. I did not.

Q. (By Mr. Wood): Did you at any time have access to the carbons of the payroll sheets either from the country or the dock? A. No, sir.

Q. At any time during your employment with Balfour, Guthrie, outside of this audit that you just spoke about did any official of Balfour, Guthrie make any check of your payroll sheets or these checks or the reconciliation of the bank account?

Mr. Jones: The same objection, your Honor.

The Court: Yes, I will sustain the objection to that. In [100] the first place it isn't within the witness' field of knowledge.

Q. (By Mr. Wood): As to these 19 missing checks you of course don't have before you the endorsers which may or may not appear upon the reverse? A. No.

(Testimony of G. L. Crowe.)

Q. You cannot now see your signature on any of those 19 if it appeared there—I mean the name of the payee written in by you? A. No.

Q. How do you know that on those 19 checks you did write in the name of the payee?

A. Some by memory, and others by a scrutiny of the books of the Interior Warehouse Company.

Q. Do you remember that on some checks you used your own name too after signing the name of the payee on the back?

A. No, I wouldn't remember that.

Q. As to those 19 missing checks do you know who any of the endorsers were after you signed the name of the payee?

A. No, I am not certain.

Q. You couldn't tell where you negotiated a single one of those checks, could you, now, without just guessing?

A. No, sir, I couldn't.

Q. You knew, of course, these annual audits were taking place every year for the Interior, made by Price, Waterhouse? A. Yes. [101]

Q. Had you previously made any of those audits yourself when you worked for Price, Waterhouse?

A. No, I never worked on the Balfour, Guthrie job for Price, Waterhouse.

Q. At the time that the audits were made or just before the audits were to be made, aside from having put in these names on the payroll sheets

(Testimony of G. L. Crowe.)

and a few names on the superintendent's time record did you make any effort to alter the books or records or hide anything from the auditors?

A. Yes, sir.

Q. You did? A. Yes, sir.

Q. Further than that? A. Yes.

Q. What else did you do in the way of attempting to hide anything?

Mr. Jones: I think that is still open to the same objection that I made to the other question. It is completely beyond anything that I went into.

The Court: I will sustain the objection.

Q. (By Mr. Wood): Where the carbon copies of the checks were marked void but the check itself actually paid how would you make a reconciliation with the Interior's bank records to show that there was no shortage?

A. State the question again, please. [102]

Q. When you marked a carbon copy of a check void that the original of it had actually been negotiated and cashed there would be a shortage in the bank account of the Interior as reflected by its own books, would there not? A. Yes.

Q. How would that be covered up? It wouldn't jibe with the bank statement; it would show payment of that check marked void on the carbon.

A. To answer that question I would have to see the books to refresh my memory and follow the specific item through the books.

(Testimony of G. L. Crowe.)

Q. You have before you the exhibit of the carbons of the destroyed checks, haven't you?

A. Yes.

Q. And some of those are marked void, are they not? A. Yes.

Q. How many of them?

A. There are six so marked.

Q. You don't remember the method you now used so that that shortage wouldn't show on the company's books?

A. Before I answer that question, are you assuming that all six of these checks that are marked void were not actually voided checks?

Q. Well, you yourself, Mr. Crowe, testified that all 19 of those were negotiated by you and paid by the bank, as I understood the testimony—that the originals were all paid by the [103] bank and later destroyed by you.

A. We are talking about voided checks.

Q. That is right, out of this list of 19. Now in six instances there you marked "void" on the carbons, didn't you?

A. I didn't mark the carbon.

Q. You didn't mark the carbon of the checks void? A. No, sir.

Q. Who wrote that?

A. I don't recognize the handwriting.

Q. Well, in reconciling the bank statement at the end of the month would you check the originals of the checks against these carbon copies of checks kept in the Interior's office?

(Testimony of G. L. Crowe.)

A. If it was necessary to get a balance.

Q. Well, isn't that the general procedure when you reconcile a bank account? You take the checks and check them against carbon copies or stubs to see if the check is actually paid or not? What method did you use to reconcile the bank statement?

A. I would list the previous month's outstanding checks and start with the number. I would have my checks sorted in numerical order and then go through and to this list that I before mentioned add any other missing numbers. Then I would refer to the carbon copies to get the amounts, and if that balanced then I was reconciled.

Q. Now in addition to adding these names and amounts to the [104] country payroll sheets—the originals—and to the dock sheets did you also record in the monthly summary sheet a larger amount than the dock payroll actually showed?

A. Do you mean by actually showing before I had changed it?

Q. Yes. A. Yes.

Q. Did you in some instances raise on the payroll sheets the amounts that were really properly due the employees as reflected by the superintendent's or the country time book? A. Yes.

Q. How about this expense account? How did you work with the expense account in some cases?

A. Are you speaking of any particular expense account?

(Testimony of G. L. Crowe.)

Q. Well, expense items like repairs and insurance. Were you able to get checks on those signed by officials of the Interior without presenting supporting vouchers? A. No.

Q. Where would you get the supporting voucher when you were going to use that check yourself?

A. I never used such checks.

Q. No checks of that character?

A. No, sir.

Q. Have you ever seen this audit that Price, Waterhouse made in 1939?

A. A report of their audit? [105]

Q. Have you ever seen their audit?

A. No, sir.

Q. Did you ever make any direct entries in the ledger itself without any supporting entries in any other book? A. I don't remember.

Q. These bank statements that were given to the Interior each month, did they ever balance up with the Interior's books, or was there always a discrepancy from 1935 to 1939 between the bank statement and the Interior's books?

A. I don't remember. There may have been months when there was no discrepancy.

Q. There may have been occasions when they were out of balance, you say?

A. Where there was no discrepancy.

Q. There may have been months where there was no discrepancy? A. Yes.

Q. But you know of months that there were discrepancies? A. Yes.

(Testimony of G. L. Crowe.)

Q. There necessarily had to be or you wouldn't have obtained the money? A. Yes.

Q. And that would be true for practically every month from 1935 to 1939? A. Yes.

Mr. Wood: That is all. [106]

Redirect Examination

By Mr. Jones:

Q. Do you know when those carbons were marked void?

A. These particular ones I have here?

Q. Yes. A. No, sir, I do not.

Q. Of the 19 checks did I understand you correctly that there are only six carbons of those checks marked void? A. No.

Q. How many?

A. I have no way of telling.

Q. You didn't void them yourself—mark them void yourself?

A. No, this isn't my writing.

Mr. Jones: Would you bring that exhibit here, please?

Q. How long has it been since you have seen a time book, a dock time book?

A. It has been almost two years.

Q. The nine of course you testified to as an estimate, or three times? That is your best recollection? You have no way of knowing whether it is nine or six or twenty, do you?

A. No, sir.

Mr. Jones: Will you take this back to the witness?

(Testimony of G. L. Crowe.)

Q. I am going to call those numbers off to you, and you see how many of those checks are marked void of the 19 missing checks, starting in at 4016. If any of the numbers that I call off [107] are marked void you just say the word "void".

A. Yes, sir.

Q. 4016, 4004, 4003, 3965, 3762, 3761, 3760, 3499, 3496, 3483. Of the country's which is first, the "B" or the "A" series? A. B.

Q. All right, "B" series, 15920. A. Void.

Q. 15367, 15340. "A" series, 10622.

A. That is void.

Q. 10346. A. Void.

Q. 10323, 10292. So out of the 19 checks that you have records of there only three were actually void? Is that right? A. Yes, sir.

Q. Now when you used this word "voided" here all you mean is there is a pencil notation appearing on the carbon copy with the word "void"?

A. Yes.

Q. And that is what you said you don't know who put it on? A. Yes.

Q. Nor when it was put on? A. No.

Mr. Jones: That is all.

Mr. Wood: That is all.

(Witness excused.) [108]

Mr. Jones: The plaintiff rests.

The Court: It is ten minutes to five, Gentlemen, and I think we might as well start in in the morn-

ing. Court is now in adjournment until tomorrow morning at 10:00 o'clock.

(Thereupon, at 4:50 o'clock P.M., March 26, 1941 an adjournment was taken until 10:25 o'clock A.M., March 27, 1941.) [109]

Portland, Oregon, March 27, 1941

10:25 o'Clock A. M.

(Pursuant to adjournment.)

Mr. Wood: Before calling our first witness, your Honor, I would like to hand Court and counsel the trial brief in two sections giving defendant's theory of the law controlling the defense. Call Mr. Griffis.

R. G. GRIFFIS

was thereupon recalled as a witness in behalf of the defendant herein, and testified further as follows:

Direct Examination

By Mr. Wood:

Q. Mr. Griffis, what is your present position with the Interior Warehouse Company?

A. I am an accountant for Balfour, Guthrie & Company which keep the books of the Interior Warehouse Company.

Q. Did you succeed to the position formerly occupied by Crowe? A. Yes.

(Testimony of R. G. Griffis.)

Q. When did you succeed to that position?

A. June, 1939.

Q. Prior to that time had you as an employee of Price, Waterhouse participated in any of the annual audits of the Interior's books?

A. Yes.

Q. Which year, do you remember? Of course you were on in '39? [110]

A. Yes. I don't remember whether I was on any before that or not.

Q. In the capacity you just mentioned you had custody and charge of the records, books, and documents of the Interior during the period involved here, '35 to '39?

A. Yes.

Q. Do you have them here in court?

A. Yes.

Q. Will you produce the Bank of California's statements to the Interior by the bank during the period from 1935 to May, 1939?

A. They are all in one box there.

Q. I think that is 24. A. Here it is.

Q. Are those the bank statements?

A. Yes.

Q. Are you also able to pick out the original time books—not the payroll sheets—covering the same period? That appears to be Pre-Trial Exhibit 23.

(The exhibit was handed to the witness.)

Mr. Wood: Would you also hand the witness, Mr. Bailiff, if you please, that audit of Price, Wa-

(Testimony of R. G. Griffis.)

terhouse? That is No. 3. That went in yesterday.

Q. Now Mr. Griffis, since you participated and assisted in getting up the audit for 1939 are you familiar with the then existing bookkeeping system and the method of operation under [111] it used by Interior at that time? A. Yes.

Q. What if any change was made in that system or the method of operating under it between the time Crowe was employed and the time you were employed in June, 1939?

Mr. Jones: If the Court please, the plaintiff at this time wishes to object to this question and all similar lines of questioning on the ground that any change made in the system does not go to prove negligence in the method of handling prior to that time. It is irrelevant and immaterial. I might as well at this time also interpose a general objection to all questions having to do with negligence or an attempt to prove negligence under the defendant's answer on the ground that the Interior Warehouse Company owed no duty of any kind to the Bank of California such as is alleged in the answer to keep its books or to reconcile its bank account, or in respect to keeping books or reconciling its bank account. Both plaintiffs are objecting to any and all evidence on that ground because there is no duty owed to the Bank of California.

The Court: The answer has passed out of the situation.

(Testimony of R. G. Griffis.)

Mr. Jones: Well, I will have to refer to the pre-trial order and cite the issues then that are made in that. It comes up on the 12th, 18th, 19th, 20th, and 21st issues as set forth in the pre-trial order.

The Court: Apparently these are set up as issues. [112]

Mr. Jones: Please?

The Court: Apparently that is set up as an issue.

Mr. Jones: It is set up as an issue, but even though it is set up as an issue that wouldn't preclude plaintiff's right to object to testimony going to prove it, your Honor.

The Court: I think it is an issue. The testimony will be admitted.

Mr. Wood: Will you read the question to him, Mr. Reporter?

(The question was read.)

Mr. Jones: Referring to a particular objection rather than a general one, of course we are objecting to any testimony as to subsequent changes.

The Court: I will sustain the objection on that ground.

Mr. Wood: On the theory that that is an improper way to prove it, your Honor?

The Court: Any subsequent changes by a person after an event which has indicated that it might be negligent, and that person has been warned beforehand, are not competent to prove the negligence.

Mr. Wood: Let me put it this way and see if there is any objection:

(Testimony of R. G. Griffis.)

Q. If any change was made, why was the change made?

Mr. Jones: Same objection.

The Court: Yes, same ruling.

Q. (By Mr. Wood): Now in that box that you have before you, Pre [113] Trial Exhibit 24, what are the contents of that box?

A. These are the bank statements and paid checks of the Interior Warehouse Company for the period under discussion.

Mr. Wood: I offer them in evidence.

Mr. Jones: No objection.

The Court: Admitted.

(The box of bank statements and paid checks, heretofore marked Defendant's Pre-Trial Exhibit No. 24, was thereupon received in evidence.)

Q. (By Mr. Wood): Please state to the Court what Pre-Trial Exhibit 23 is.

A. These are the timebooks of Irving Dock.

Q. During that same period? A. Yes.

Mr. Wood: I offer them in evidence.

Mr. Jones: We object to the timebooks being received in evidence, Pre-Trial Exhibit 23, on the ground that they are irrelevant, incompetent, and immaterial. I would like to also add to that objection that there is no duty on the part of the drawer of these checks to compare the amount of the checks or the amounts on payrolls with the timebooks at the dock office.

(Testimony of R. G. Griffis.)

The Court: The matter has been gone into in your case in chief regarding changes that were being made on these books and whether there were changes made, and under the circumstances I think they are admissible. [114]

Mr. Jones: That was only on cross-examination, was it not, your Honor?

The Court: Well, as I remember, there were some questions on direct as to what was done regarding the dock books.

Mr. Crowe: Well, I know that I didn't ask Mr. Crowe a thing about it. I don't think I asked Mr. Griffis a thing about it. I am sure I didn't even mention timebooks to either of those. If it occurred with anybody I think it would be something that Mr. Rawlinson said in answer to a question. There was no attempt on my part to solicit the information. I am sure the question itself was not directed to that.

The Court: In any event the cross-examination was proper on the basis that it was laid, and the testimony on cross-examination of course is binding on you. I don't remember any objection to that cross-examination, and inasmuch as you have put in an explanation as to how the discrepancies first appeared, and these seem to be connected with that in some way, I shall admit them. Objection overruled.

(The time books, heretofore marked Defendant's Pre-Trial Exhibit No. 23 were thereupon received in evidence.)

(Testimony of R. G. Griffis.)

Q. (By Mr. Wood) Were there any time books kept out in the country warehouses? A. No.

Q. What was the method of keeping time in the country warehouse? [115]

A. The payroll is made up in such a way that the time is kept on the payroll.

Q. On the payroll sheets? A. Yes.

Q. In that respect the system differed from the method of handling at the dock? A. Yes.

Q. Do you have here carbons of those payroll sheets, both in the country and on the dock?

A. There are some here from the country but not all of them, due to the fact that the country agents have to have them for the names of the employees, but the dock is here and some of the country ones are here.

Mr. Wood: Will you hand the witness No. 34, Mr. Bailiff, and 26, please, while you are there; No. 22 also.

Q. Do you find Pre-Trial Exhibit 34?

A. These are the duplicate Irving Dock payrolls.

Q. Where are the duplicates for the country?

A. Some of them are right on top there.

Q. Do you now have the duplicate pay sheets for the dock?

A. Would you repeat that again?

Q. Do you now have the duplicate carbons of the pay sheets for the dock?

(Testimony of R. G. Griffis.)

A. For the dock and the country, yes.

Q. What number is that? [116]

A. Thirty-four for the country.

Q. And which is the dock?

A. The number has been taken off. They were wrapped up. I don't know the number.

Q. You are thoroughly familiar with these books and records?

A. Yes.

Mr. Wood: Perhaps the witness could help the bailiff, your Honor. I am not familiar with those.

The Court: The court will take a recess.

(A recess was then taken, after which proceedings were resumed as follows):

Mr. Jones: If the Court please, in connection with the general objection I started to make at the beginning of the testimony I wish to call the Court's attention to the last paragraph of the pre-trial order in which we say, after those issues are stated, "Excepting, however, the plaintiffs do not regard the issues stated in Paragraphs 11, 12, 18, 19, 20, and 21 of Article VII as material in this case." We have tried from the time of preparing the pre-trial order as best we could to take the position that we owed the bank no duty in the respects mentioned in those issues that are found in Paragraphs 12, 18, 19, 20 and 21, and that consequently all of this line of testimony is irrelevant, immaterial, and incompetent. At the time of drawing the pre-trial order I felt that if the other side wanted to make an issue it had the right to make [117] the issue and we could come in

(Testimony of R. G. Griffis.)

here and object to evidence to support the issue, just the same as under the old practice when the issue is made on the pleadings.

The Court: That is quite correct.

Mr. Jones: But in order to save our position I put it in here, and I wish to renew our objection and call attention to the fact that we have saved it all along.

The Court: Yes, you have saved it, and I still admit the evidence that I have let go in so far. You may base an exception on this position that you now take.

Mr. Jones: I don't want to be constantly popping up in order to save that objection every time a question is asked, but the next time one bears on it I want to make it and have it as a continuing objection if you care to have a continuing objection, otherwise I will make them each time.

The Court: I would rather you would make them each time.

Mr. Jones: All right.

The Court: It makes a much better record. Proceed.

Q. (By Mr. Wood): Mr. Griffis, you now have in your possession Pre-Trial Exhibit 34?

A. Yes.

Q. What is that Pre-Trial Exhibit 34?

A. That is the duplicate payroll records of the dock and part of the country.

Q. For the period in question here? [118]

A. Yes.

(Testimony of R. G. Griffis.)

Q. September 1, '35 to May 2, '39?

A. Yes.

Mr. Wood: I will offer them in evidence.

Mr. Jones: We object to them as incompetent, irrelevant, and immaterial, and on the further ground that the dock payrolls are not mentioned in the pre-trial order, as near as I can tell from the pre-trial exhibits.

The Court: That is a vital objection, it is true.

Q. (By Mr. Wood): Do you have them all there, all together, Mr. Griffis?

A. Yes. Could I see a copy of that pre-trial exhibit? Maybe I could pick it out.

Q. The pre-trial order? A. Yes.

(A copy of the pre-trial order was handed to the witness.)

The Witness: I can't find it here.

Q. (By Mr. Wood): How long have those records been here?

A. The records were all brought in at one time.

Q. At pre-trial? A. Yes.

Q. And did you yourself compile this list of records? A. No.

Q. Did you work with whoever did compile them?

[119]

A. Yes, that was the list that was made.

Q. Did you not include the dock payroll carbons as well as the country carbons?

A. I don't know. It does not seem to be typed in here.

(Testimony of R. G. Griffis.)

Q. Was there a cover on those carbons?

A. No, there was no cover. They were wrapped up in one sheet of paper with a string around.

Q. Were the country payroll carbons with them?

A. I wouldn't say, there were so many things there.

Mr. Wood: I now offer in evidence Exhibit 34, the carbons pertaining to the country warehouse pay sheets which the witness has identified.

Mr. Jones: We have already objected to it as incompetent, irrelevant, and immaterial.

The Court: The Court overrules the objection. As I understand it, these exhibits now offered as Exhibit 34 are part of the basis for the audit which has already gone into evidence.

Mr. Jones: No, your Honor, that is not our understanding, because the country payroll originals, which are Pre-Trial Exhibit No. 21, are part of the audit, and there is no duty as we understand it on the part of any auditor or bookkeeper to go beyond the original copies and go back to the carbon copies that were made for the agent's information to keep at his office up in the country. They never come to the main office and no auditor [120] would refer to them in making an audit. We feel that they are entirely immaterial and I am sure were not gone into in any way on our case.

The Court: Well, I am not going to rule that the duty of an auditor doesn't extend that far. I don't know what the duty of an auditor is, and I don't know

(Testimony of R. G. Griffis.)

why all the records of the corporation aren't the basis of an audit.

Mr. Jauregui: Could I extend that objection?

The Court: Yes.

Mr. Jauregui: On the ground that the question of the duties of the auditor in making an audit is not an issue in the case, as long as the auditor gets out the information that is requested in getting the audit, which was done in this case, and we make the objection on the ground that the depositor owes no duty to the bank to examine either the carbon copies or the time books, its duty being to examine the checks themselves and determine that they are valid checks.

The Court: Objection overruled.

(The duplicate payroll records, heretofore marked Defendant's Pre-Trial Exhibit No. 34, were thereupon received in evidence.)

Mr. Wood: The witness has identified carbon copies of the dock payroll sheets. It is true that I find no express pre-trial number given those. These books and records, your Honor will remember, were all brought up by the other side at the time [121] of pre-trial and have been in the custody of the Court ever since. This witness has now identified the carbon copies of the dock records. It is true that in 34 the limitation is as to country payrolls, but with his identification I move, your Honor, that we be permitted to mark "34-A" upon the carbon copies of the dock payrolls and that they be admitted under

(Testimony of R. G. Griffis.)

this witness' identification of them as the carbons of the dock payrolls.

Mr. Jones: If the Court please, in the first place we didn't bring them up here except that maybe we got them out on your order and demand and brought them up here as your exhibits, on your request. 21 says, "Country payroll sheets." 22 says, "Dock payroll sheets." It made a complete statement on the face of the pre-trial order that there were dock payrolls as well as country payrolls. That information has been there. They skip down to 34 and ask for duplicates of one of them. If they hadn't been on the face of the order there might be some excuse in saying that they were lost in the whole mass, but they have the third and fourth items in the list, and then they do down and ask for duplicates of them, and I don't think there can be any suggestion of failure on the part of the plaintiffs in not calling their attention to them.

The Court: The objection is sustained.

Q. (By Mr. Wood): Mr. Griffis, are you familiar with the 107 checks designated here as Pre-Trial Exhibit 1? A. Yes. [122]

Q. And are you familiar with the carbon copies of the 19 checks designated as Exhibit 2?

A. Yes.

Q. Referring now to Pre-Trial Exhibit 34—do you wish to check those and the carbons also?

A. Yes.

Q. Will you hand him Pre-Trial Exhibits 1 and 2? I will ask you how many, if any, of those checks,

(Testimony of R. G. Griffis.)

Exhibit 1, or the carbons, Exhibit 2, appear upon Exhibit 34.

Mr. Jones: On the same ground, that there is no duty on our part or on the part of an auditor that we may employ, to make this sort of a check for the benefit of the defendant in this case, we object to it, and on the further ground that it is incompetent, irrelevant, and immaterial.

The Court: I am not admitting these on any theory, Mr. Jones; I am simply saying in view of the situation I think that they are competent, that is, in view of the fact that the other records have been introduced. Now as to what theory that may lend itself to is a different matter. I am simply ruling on the admissibility in evidence. I have admitted them, and I now admit this testimony. The checks themselves are in evidence—you introduced them—and I think it is perfectly proper to go into the other records of the company to show what the situation was.

Mr. Jones: Well, off the record, I don't like to keep jumping [123] up either. As far as handling it, I would just as leave make a continuing objection, but I am only doing it to follow your own—

The Court (Interrupting): Yes, there is nothing that I have said that would prevent you from making that objection. You should have it in the record. I am simply explaining the theory of the Court so there won't be any doubt as to what I am doing.

(Testimony of R. G. Griffis.)

The Witness: Can I ask you again what you want me to do?

Mr. Wood: Will you read that question to him, Mr. Reporter?

(The question was read as follows: "I will ask you how many, if any, of those checks, Exhibit 1, or the carbons, Exhibit 2, appear upon Exhibit 34.")

A. Well, that is hard to say.

Q. Can you reverse that? How many do not appear?

A. I think that would be pretty hard to say, whether they do or don't, because you can't check them to this very readily.

Q. Would the audit, Exhibit 3, assist you in making that check?

A. Well, due to the fact that these are duplicate records and were not used in the office you can't check very well these checks to this record.

Q. Are you able to do it off the audit, Exhibit 3?

A. You mean to check these checks to this audit?

Q. To see which checks, if any, do not appear on the carbons of country payrolls.

A. I can do it indirectly but I can't do it directly to this.

Q. Can you do it by the audit? [124]

A. No.

Q. How do you mean, indirectly, Mr. Griffis? I don't understand.

A. First of all, you would have to check them to the original payroll.

(Testimony of R. G. Griffis.)

Mr. Wood: Those are here. Will you hand the Witness Exhibit 21, and also 22 while you are there, Mr. Bailiff, to save time?

The Court: I think that I am not going to take the time of the Court. If the witness wants to he can take these records outside of court and check them back and tell how he did it on the stand, but I don't think I should waste the time of the Court.

Mr. Wood: I don't blame your Honor. This is the only witness thoroughly familiar with them, though, and he is on the other side.

The Court: But you are calling him as your witness.

Q. (By Mr. Wood): Can you make that check readily? A. Yes.

Mr. Jaureguay: And we wish to enter our objection as to him calling him on the other side. This happens to be an employee of our assignor, but that doesn't prevent them from talking to him.

The Court: I have already made the point that he is their witness.

Mr. Wood: He says he can do it readily on Pre-Trial Exhibits 21 and 22, your Honor. [125]

A. Those are the original payroll records.

Q. Of both the country and the dock?

A. Yes.

Mr. Wood: I offer them in evidence.

Mr. Jones: For the same reasons we object to those being admitted.

The Court: Now as I understand it, the subsidi-

(Testimony of R. G. Griffis.)

any objection doesn't apply to these because there is no question but what these original records were used as a basis for the audit.

Mr. Jaureguy: That is right. There is no question about that, and there is also no question about the pre-trial order.

The Court: The objection is overruled. The exhibits are admitted.

(The country payroll sheets, heretofore marked Defendant's Pre-Trial Exhibit No. 21, and the dock payroll sheets, heretofore marked Defendant's Pre-Trial Exhibit No. 22, were thereupon received in evidence.)

Q. (By Mr. Wood): Do you have those before you now, 21 and 22?

A. I just want 21.

The Court: I now direct that the witness make no computation on the witness stand. If he wants to make that computation outside and then come on and tell how he did it I will permit that, but I will not permit him to sit here and make a lot of computations. [126]

Mr. Wood: I am not asking him to do that; I just want him to check the names——

The Court: (Interrupting) I am not going to permit him to do that in court. He can take that out of court to do that. Go ahead with any other examination.

Mr. Wood: If I may have the privilege of recalling him after the noon recess I will have him do that.

(Testimony of R. G. Griffis.)

The Court: Yes.

Mr. Wood: Will you hand the witness Exhibits 19 and 20, please?

Q. State what they are, please.

A. Exhibit 19 is the general ledger of Interior Warehouse Company.

Q. Covering the period of time involved in issue here? A. Yes.

Q. And 20 is what? A. General journal.

Mr. Wood: I offer them in evidence.

Mr. Jones: We object to them as incompetent, irrelevant, and immaterial, and I will add to it that they do not go to show that we violated any duty owed to the defendant.

The Court: Both of these were used as a basis of your audit, and on that basis I admit them.

(The general ledger, heretofore marked Defendant's Pre-Trial Exhibit No. 19, and the general journal, [127] heretofore marked Defendant's Pre-Trial Exhibit No. 20, were thereupon received in evidence.)

Mr. Wood: Mr. Bailiff, will you kindly hand the witness Pre-Trial Exhibits 25 and 26?

Q. Will you state what Pre-Trial Exhibit 25 is?

A. 25 are the Irving Dock payrolls from November, 1935 to February, 1936.

Mr. Wood: I offer them in evidence.

The Court: The originals?

A. The originals.

Mr. Jones: The same objection.

(Testimony of R. G. Griffis.)

The Court: On the same basis the Court admits the exhibit.

(The dock payroll sheets, heretofore marked Defendant's Pre-Trial Exhibit No. 25, were thereupon received in evidence.)

Q. (By Mr. Wood): What is Pre-Trial Exhibit 26, Mr. Griffis?

A. 26 are duplicate payroll checks.

Q. Covering what period of time?

A. From February, 1937 to December, 1938.

Q. Did you or anyone else of the Price, Waterhouse people use those in connection with the audit of 1939?

Mr. Jones: We object to——

Mr. Wood: (Interrupting) I withdraw that question. I offer the exhibit. [128]

Mr. Jones: We object to the exhibits on the ground that they are incompetent, irrelevant, and immaterial, do not go to prove any allegations or any issues stated in the pre-trial order of the duty we owed to the defendant, and as I recall, none of the carbon copies of checks went into any examination, direct or cross, on the plaintiffs' case except those that were made a part of and received as Exhibit 2.

Mr. Wood: Your Honor, we are not shut out in our evidence to what they introduced in their case. We don't have to respond just to the evidence they put in. We are presenting our own defense.

(Testimony of R. G. Griffis.)

The Court: I understand that. I want to make it perfectly clear, as I have before, that I am not ruling on your theory of the defense and that I am not admitting the documents on that basis. However, I think with an audit having been introduced here and pertinent documents relating to the audit that I shall receive them.

(The duplicate payroll checks, heretofore marked Defendant's Pre-Trial Exhibit No. 26, were thereupon received in evidence.)

Q. (By Mr. Wood): Please state what Pre-Trial Exhibit 27 is.

A. Those are the expense reports from the country agents.

Mr. Wood: I offer it in evidence.

Mr. Jones: The same objection.

The Court: I didn't catch the answer. [129]

The Witness: They are the expense reports from the country agents.

The Court: How are those pertinent to the audit?

Mr. Wood: Let me ask the witness a question or two on that.

Q. Did your audit disclose that Crowe used the expense account of the country agents in any manner in forging these checks?

Mr. Jones: If he didn't prepare that he is asking for a hearsay answer.

Mr. Wood: He said he worked on the audit himself, that he himself worked on the audit.

(Testimony of R. G. Griffis.)

Mr. Jones: If he knows personally I have no objection.

Mr. Wood: That is what I am asking him, if he does know.

The Court: Yes.

The Witness: I wouldn't swear to it.

Q. (By Mr. Wood): You worked on that audit yourself?

A. I worked on it, but I can't remember.

Q. Would the audit refresh your recollection? Have you got that audit there, No. 3?

A. Yes.

Q. Turn to the reference to expense account at the top of Page 3. Do you find that?

A. Yes.

Q. Does that refresh your recollection of having made an examination of the expense account?

A. Yes, those expense accounts were used. [130]

Q. That exhibit that you have there, 27, relates to the expense account? A. Yes.

Mr. Wood: I offer it in evidence.

The Court: Admitted.

(The expense reports from country agents, heretofore marked Defendant's Pre-Trial Exhibit No. 27, was thereupon received in evidence.)

Q. (By Mr. Wood): Please refer to Exhibit 28. What is 28?

A. 28 are carbon copies of checks for Irving Dock and country payrolls for 1935 to 1937.

(Testimony of R. G. Griffis.)

Mr. Wood: I offer them in evidence.

Mr. Jones: Same objection.

The Court: Same ruling.

(The carbon copies of checks for dock employees and country employees, heretofore marked Defendant's Pre-Trial Exhibit No. 28, were thereupon received in evidence.)

Q. (By Mr. Wood): Please state what Pre-Trial Exhibit 29 is.

A. They are duplicate checks from January to June, 1939.

Mr. Wood: I offer them in evidence.

Mr. Jones: Same objection.

The Court: So I get clear on this, how do those relate to it?

Q. (By Mr. Wood:): Was any data in Pre-Trial Exhibit 29 used by you or any of the other auditors of Price, Waterhouse, in [131] making the audit? You used all the books and records in making the audit, did you not?

A. Yes, sir, you have access to all the records.

Q. And those were used?

A. Yes.

Mr. Wood: I offer them in evidence.

The Court: Admitted.

(The duplicate checks from January to June, 1939, heretofore marked Defendant's Pre-Trial Exhibit No. 29, were thereupon received in evidence.)

(Testimony of R. G. Griffis.)

Q. (By Mr. Wood): What is Pre-Trial Exhibit 30?

A. Payroll and expense summaries.

Mr. Wood: I offer it in evidence.

Mr. Jones: Same objection.

The Court: Admitted.

(The payroll and expense summaries, heretofore marked Defendant's Pre-Trial Exhibit No. 30, were thereupon received in evidence.)

Q. (By Mr. Wood): State if you know what Pre-Trial Exhibit 31 is.

A. They are the drafts from the country agents.

Q. Covering what period?

A. Covering this period of time.

Mr. Wood: I offer them in evidence. [132]

Mr. Jones: Same objection.

The Court: Drafts?

Mr. Wood: Yes, your Honor, this audit refers to paying some of the men in the country by draft, and then later there is a check covering that same identical draft.

The Court: They are admitted.

(The drafts from country agents, heretofore marked Defendant's Pre-Trial Exhibit No. 31 were thereupon received in evidence.)

Q. (By Mr. Wood): What is Pre-Trial Exhibit 32?

A. Duplicate expense checks.

Mr. Wood: I offer it in evidence.

(Testimony of R. G. Griffis.)

Mr. Jones: I am making the same objection to that, and call attention to the fact that nowhere during the testimony do I remember anything about duplicate expense checks ever being referred to anywhere.

Mr. Wood: This audit refers to a duplication through the expense account. The audit itself makes reference to it.

The Court: What page?

Mr. Wood: At the top of Page 3, the fourth line, "Charging labor, repairs, insurance or other expense accounts without proper support", the audit says, "contra entry being to accounts payable to which irregular disbursements had been charged." Then there is a reference in this schedule. Well, those other references are in a part of this exhibit which your Honor did not admit. [133]

The Court: The objection is presently sustained.

Q. (By Mr. Wood): What is Pre-Trial Exhibit 33?

A. Those are expense statements and vouchers.

Mr. Wood: I offer them in evidence.

Mr. Jones: Same objection.

The Court: That refers to the expense account which we have been——

Mr. Wood (Interrupting): But not duplicates. The prior one was duplicates, and this refers to that language I called your Honor's attention to at the top of Page 3.

The Court: They are admitted over the objection.

(Testimony of R. G. Griffis.)

(The expense statements and vouchers, heretofore marked Pre-Trial Exhibit No. 33, were thereupon received in evidence.)

Q. (By Mr. Wood): What is Pre-Trial Exhibit 35, if you know?

A. The deposit book.

Q. Covering the period involved here?

A. Yes.

Mr. Wood: I offer it in evidence.

Mr. Jones: Same objection.

The Court: Is there any reference to that?

Mr. Wood: I don't see any statement about the deposit book in here. I don't think it was referred to in the audit.

Q. Let me ask you, in making the audit did you have access to that deposit book? Was that part of the data furnished you [134] for the purpose of compiling the audit of '39? As a matter of fact, all this material was furnished to you, wasn't it, for your inspection? A. Yes.

Q. Including this deposit book? A. Yes.

Mr. Wood: I offer it in evidence.

Mr. Jauregui: If your Honor please, it seems to me that that certainly would not be sufficient. The auditors go into everything that is offered them. It isn't what is offered them, it seems to me, it is what is used.

The Court: I think that is correct. Unless he testifies it was used I won't admit it.

(Testimony of R. G. Griffis.)

Q. (By Mr. Wood): Do you recollect whether it was used in compiling that audit?

A. I don't remember.

The Court: The objection is presently sustained.

Mr. Wood: With the understanding that we already have, that during the noon hour he may make that computation, I will excuse this witness now.

The Court: Do you desire to reserve cross-examination?

Mr. Jones: Yes, if your Honor please.

The Court: The witness may be withdrawn.

(Witness withdrawn.) [135]

CHARLES E. RAWLINSON

was thereupon recalled as a witness in behalf of the defendant herein, and testified further as follows:

Direct Examination

Mr. Wood: Will you hand the witness the audit, Exhibit 3?

Q. (By Mr. Wood): Mr. Rawlinson, there have been introduced here Pre-Trial Exhibits 19 to 35, inclusive, excepting 32 and 35. Do you recognize those exhibits there before you?

A. I have 3, 1, 2, 34. Any more? Do you refer to any others?

Q. All those exhibits that are there before you, including those numbers, do you recognize those as data furnished you for the purpose of making the audit of '39?

A. I do.

(Testimony of Charles E. Rawlinson.)

Q. And were they used for that purpose?

A. Such information therefrom as was necessary for our purpose.

Q. Now, in making your audit did you check any of these 107 checks or the 19 checks represented by carbons back against the country payroll carbons?

A. We did when we—no, the 106 wouldn't be on the carbons from the country.

Q. Those were all dock—107?

A. No, some of them were country, but some of these——

Mr. Jones (Interrupting): Just a minute before you go any further with that. I am going to interpose an objection to the testimony of this witness on the ground that it is incompetent, [136] irrelevant, and immaterial. The Interior Warehouse Company, our assignors, owes no duty whatever to the defendant in this case to make any checks such as referred to in any of the issues in Paragraphs 12, 18, 19, 20, and 21 of the pre-trial order, and for that reason the testimony would not be competent or relevant in this case at this time.

The Court: Again the Court isn't ruling on the theory. This particular question may be answered.

Q. (By Mr. Wood): Do you remember the question, Mr. Rawlinson?

A. No. I should like to make one point clear. You keep referring to the audit, and it has been referred to loosely as referring to two different phases of work. It has been used in referring to the an-

(Testimony of Charles E. Rawlinson.)

nual examination conducted by us, and it has also been used with reference to this investigation. It is sometimes a little difficult for me to tell when you ask the question whether you infer that we did a certain piece of work in connection with an annual examination or whether we did it in connection with this specific investigation. I think unless you specifically ask me I will understand that you will make reference solely to the work done in connection with this investigation as reported upon in Exhibit 3.

The Court: The rulings of the Court have been based upon the exhibit which the Court referred to as an audit.

Mr. Wood: Will you read the question, Mr. Reporter?

(The record was read by the reporter.) [137]

The Witness: Shall I continue?

Mr. Wood: It is my understanding that the Court has ruled you may.

The Court: Yes.

A. (Continuing) Some of those represented checks supporting fictitious payrolls—original payrolls prepared and written by a person other than the country agent, the actual country agent. On the face of them they appeared regular. They turned out later to be spurious.

Q. (By Mr. Wood): They appeared regular from the original country payroll?

(Testimony of Charles E. Rawlinson.)

A. They did.

Q. Did I ask whether or not you made a check against the carbon of that payroll?

Mr. Jones: Same objection.

The Court: Yes.

A. In our investigation we found that there were not carbon copies for certain of the purported originals in the Portland office.

Q. (By Mr. Wood): Do you remember how many were missing on that? Did the investigation show? Does your audit show?

A. Specifically not, but they would be included in this group of checks which were written to Portland employees and were actually paid by other checks drawn at Portland.

Q. Which schedule is that? [138]

A. That is Exhibit A; your Pre-Trial Exhibit 3, our Exhibit A. They would be included in that group.

Q. Schedule A as qualified afterwards breaks down the checks to the individuals?

A. Well, Schedule 3 supporting Exhibit A contains that list. It doesn't say specifically on its face whether all of these items were supported by spurious payrolls, or shall we call them payrolls which appeared regular on their face but for which no carbons were in existence, as subsequent events show.

Q. Do any of those names appearing on Schedule 3 attached to Exhibit A of the audit appear on the country payroll carbons?

(Testimony of Charles E. Rawlinson.)

A. They do.

Q. All of them?

A. Yes, the heading of the list says, "List of checks negotiated in Portland which had been written payable to country employees who were actually paid by other checks drawn in Portland." [The implication of the heading of the schedule there is that these people were also legitimately on country payrolls, and looking down the names, from the work that we have done, they appear familiar.

Q. Those are duplicate payments?

A. Yes.

Q. I am not speaking about duplicate payments. I am speaking of a single check being drawn—whether or not in that case you checked back against the carbons of the country payrolls. [139]

A. You mean whether during our examination we checked back all the checks against the carbons?

Q. That is right.

A. I don't think the procedure would develop that way. I think we would check them back against the payrolls that were available, the originals, and then we obtained the carbons from the country and compared the carbons with the originals.

Q. You did compare the carbons with the originals?
A. We did.

Q. Are you able to tell the Court any discrepancies there might have been between those two, the originals and the carbons?

(Testimony of Charles E. Rawlinson.)

A. Not directly, but it would appear that all this list would be differences.

Q. Which list are you referring to?

A. Schedule 3 of our Exhibit A.

Q. It would appear that none of those names——

The Court: (Interrupting) Just a moment, let's give the pre-trial exhibit number.

A. Pre-Trial Exhibit No. 3.

Q. (By Mr. Wood): It would appear that none of those names appeared upon the carbons of the country payrolls?

A. They all appeared upon the carbons but not supporting this particular group of checks.

Q. Well, as to this particular group of checks there was no reference made on the carbons to them, was there? [140]

A. Probably not. I say probably not because I would have to recheck them to be sure that they didn't. This work was done a considerable time ago, but the indication from the heading of the schedule is that that would be the situation.

Q. And what would be the situation in Portland with reference to carbons of payrolls?

A. You are referring now to the dock payrolls?

Q. Dock payrolls and not in the case of duplicate payments.

Mr. Jones: The same objection.

Mr. Wood: Referring only to single payments.

Mr. Jones: And furthermore, the duplicates are not in evidence here.

(Testimony of Charles E. Rawlinson.)

The Court: I think that this is really cross-examination as far as this particular thing is concerned. I will sustain the objection.

Q. (By Mr. Wood): Please refer to Exhibit 3, Page 3, at the top of the page. Your audit lists five methods allegedly used by Crowe in effecting these speculations, does it not? A. It does.

Q. The first one says, "Increases in dock and country payrolls by adding names and amounts thereto"——

Mr. Jones: (Interrupting) Now if the Court please, we introduced this payroll yesterday. Mr. Wood cross-examined on all of the things he has gone into now as much as he wanted to, and all he is doing today is perpetuating or continuing the [141] cross-examination that he did yesterday, and we object to this line of testimony, not only on the grounds of our objections already made, but on the additional ground that it is in the nature of cross-examination.

The Court: Not only that, but this specific item that counsel is now referring to is the one that was excluded by the Court. The objection is sustained.

Mr. Wood: That heading at the top of page 3 was excluded?

The Court: I remember you objected specifically to the different methods Crowe was supposed to have used, and the Court excluded them at your motion. My memory may be faulty on that, but I don't think it is. That being the case, I won't permit you to cross-examine on it.

(Testimony of Charles E. Rawlinson.)

Q. (By Mr. Wood): Mr. Rawlinson, your first audit on behalf of Interior as far as the period of time covered in this audit is concerned would be in the forepart of 1936, would it not?

A. Now you are again referring to two things. Do you refer to an annual examination when you—

Q. (Interrupting) That is right.

A. Our first annual examination covering this period would come in as at March 31, 1936.

Q. Some of these checks listed in your audit are dated 1935? A. Yes.

Q. As having been improperly withdrawn?

A. Yes. The examination was March 31, 1936; as of that date. [142]

Q. Why would not the audit of 1936 disclose checks that were cashed in 1935?

Mr. Jones: I object to that on the grounds of incompetency, irrelevancy, and immateriality. I further object to the way the question is put, and as calling for the conclusion of this witness on a point that is not even embraced within the scope of the duties that he had, as have been developed by the evidence; on the further ground that it is nothing except in the nature of cross-examination, which he went into yesterday.

The Court: What was the question, Mr. Reporter?

(The question was read by the Reporter.)

The Court: I don't think it makes any difference. He may answer. I think I know the answer.

(Testimony of Charles E. Rawlinson.)

Mr. Jones: Isn't there more to that question than that?

The Reporter: No.

A. The scope of the examination was such that it wouldn't necessarily come to light, the scope of the examination and the instructions of Balfour, Guthrie & Company and subsidiary companies.

The Court: I don't know that I understand that.

The Witness: The answer?

The Court: Yes.

A. The question was, why didn't this particular transaction that occurred in 1935 come to light in our examination at March 31, 1936. The scope of the examination of Balfour, Guthrie & Com- [143] pany and its subsidiary companies is not such that would necessarily disclose some individual relatively small defalcations in relation to the whole of the companies examined.

Q. (By Mr. Wood): Do you mean that your examination in '36 was rather a sketchy one of the Interior's affairs?

A. It was such an examination as might be made in relation to the subsidiary company of a group of companies to satisfy ourselves as to the substantial accuracy of the balance sheet of that subsidiary, which we did.

Q. Now when you made your annual examination and report in 1937 did your examination then disclose these forged checks for 1935 and 1936?

A. It did not.

(Testimony of Charles E. Rawlinson.)

Q. Why? A. The same remarks apply.

Q. Would your answer be the same with reference to your annual examination and report in 1938 as concerns the forged checks for '35, '36, and '37?

A. The answer would be the same with respect to the individual year. You are not implying from that question that possibly these matters of prior years would have developed and come to light in that latter year?

Q. I am not trying to imply anything, Mr. Rawlinson. I just want to see what kind of a check you did make in those years.

A. Well, the answer with respect to the transactions for the [144] year ending March 31, 1938 is the same as for the transactions ending March 31, 1937.

Q. None of these peculations were discovered during that time? A. They were not.

Q. Now prior to making this audit here, Pre-Trial Exhibit 3, did you make your annual investigation and report to Balfour, Guthrie and its subsidiaries?

A. No, it was at the commencement of our work in connection with our usual annual examination of Balfour, Guthrie & Company that this matter came to our attention.

Q. Which report did you get out first then, the one that is in evidence, Exhibit 3, or your annual examination and statement?

A. The report on Balfour, Guthrie and its subsidiaries would be after this date.

(Testimony of Charles E. Rawlinson.)

Q. Do you have a copy of that here with you?

A. No, that is in San Francisco.

The Court: Is this examination going to take very long? The Court is required to be on the bench again at one o'clock, so at this time I think I shall suspend for the present, and perhaps in view of that circumstance you had better have these exhibits taken out where you can work with them during that time. Take them into the library, and I will recess at this time.

Mr. Wood: Until two?

The Court: Until two.

(Thereupon, at 12:00 o'clock noon, March 27, 1941 a recess was taken until 2:45 o'clock P. M. of the same date.) [145]

Portland, Oregon, March 27, 1941.

2:45 o'clock P. M.

(After recess.)

Mr. Wood: Mr. Rawlinson, will you resume the stand, please?

CHARLES E. RAWLINSON

thereupon resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Wood:

Q. During the time your company was auditing the books of the Interior—I mean the annual audits of '36, '7, and '8—did you at any time or your com-

(Testimony of Charles E. Rawlinson.)

pany at any time criticize or offer any suggestions to the Interior with reference to the manner in which its records and funds were handled?

Mr. Jaureguy: I object to that as incompetent, irrelevant and immaterial. Even assuming that there was any merit to their contention that there was improper handling, that is to be determined on the intrinsic merits of the system they had, and not what somebody told them.

The Court: The objection is sustained.

Q. (By Mr. Wood): As to these 19 checks which are missing, Exhibit 2 being a carbon of the face of those checks, when did you discover that the originals of those were destroyed?

A. At the time of the investigation in May, 1939.

Q. What is the difference between a balance sheet audit and a detailed yearly audit? [146]

A. A balance sheet audit is made for the purpose of determining the substantial accuracy of the items appearing on the balance sheet at a given time and to review the profit and loss account. There are various types of detailed audits. There is a detailed audit to determine the accuracy of all cash transactions for the year. There might be a detailed audit to establish the correctness of the capital assets accounts. The detailed audit might cover all of the transactions of the company, but that is always limited, because the transactions of the company—where do you stop? There isn't such a thing as a detailed audit on which two people could agree exactly.

(Testimony of Charles E. Rawlinson.)

Q. Which character of audit did your company furnish Balfour, Guthrie in the years I mentioned, '36, '7, and '8?

A. I believe it was a balance sheet audit.

Q. And in checking into the records of the Interior which character of audit was used?

A. It would be a balance sheet audit with such limitations in the scope as were arranged between the principals of the parent company and the partners of our firm.

Q. I was going to ask about that. Who limited the scope?

Mr. Jones: If the Court please, there is no duty on the part of any corporation in the State of Oregon to furnish any particular kind of an audit for the benefit of any bank. We object to this line of testimony as irrelevant, incompetent, and immaterial. [147]

The Court: He may answer.

Q. (By Mr. Wood): Do you remember the question?

A. May I have it read, please?

(The question was read by the reporter.)

A. I am not in a position to say.

Q. You don't remember whether they did or the Interior did?

A. I wouldn't know. The instructions on that would come from the officials of the parent company to the members of our firm in San Francisco.

Q. But it was a limited audit in each of those years? A. Yes.

(Testimony of Charles E. Rawlinson.)

Q. Referring to Exhibit 19, the ledger of the Interior in evidence here, are you able to point out any direct entries made in that ledger without supporting vouchers or support by books of original entry as disclosed by your audit?

A. It would be practically impossible to put a finger on it by just turning over sheets.

Q. Does your audit disclose that there were some?

A. The audit disclosed there were some.

Q. Without supporting entries in original books?

A. Yes. There were very few of that particular type.

Q. I note down at the bottom of Schedule 4 of your audit an asterisk and then these words: "In these instances proper payment had been made to the employees in a combination of drafts, check and cash." [148]

A. I should like to have Pre-Trial Exhibit 3 placed before me. Is that on Schedule 3?

Q. Schedule 4. Do you find that language?

A. "In these instances proper payment had been made to the employee in a combination of drafts, check and cash." Just what was the exact question?

Q. I hadn't put the question. I asked you about that language in the audit—directed your attention to it. Now with your experience as a certified public accountant I ask you whether or not that isn't a system or method calculated to permit defalcations.

A. No.

(Testimony of Charles E. Rawlinson.)

Q. Wouldn't a system calling for a single check or single draft be better designed to prevent defalcation?

Mr. Jaureguy: I object to that on the ground that it is comparing two systems, and the question isn't whether some other system would be better, the question is, even assuming there is any merit to their contention, whether the system used was reasonably proper.

The Court: That is my opinion. This isn't a case where they are bound to use every device, care, and precaution, and under the circumstances the Court sustains the objection.

Q. (By Mr. Wood): When you discovered that duplicate payments were recorded on the books did you find any supporting entries in the case of each of them, that is, the one payment and the [149] duplicate payment,—did you find supporting entries in the book for both?

A. Yes, where there was a disbursement of money there would have to be an entry charging some expense account or payroll, as the case may be.

Q. Even in the case of duplicate payments, both would be supported by some—

A. (Interrupting): In some way they would have to get into the books. It might be that a combination of entries would take care of three checks, all of which were not material in themselves in amount.

Mr. Wood: That is all.

(Testimony of Charles E. Rawlinson.)

Cross-Examination

By Mr. Jones:

Q. Mr. Rawlinson, these various audits that you would make there always found the books of the Interior Warehouse in balance, did they not?

A. Yes.

Q. Did Balfour, Guthrie maintain a controlling account in its own organization under the Balfour, Guthrie books for the Interior Warehouse Company?

A. Yes, they had an inter-company controlling account.

Q. Did the balances as shown by your audits of the Interior Warehouse Company reconcile with the controlling accounts of Balfour, Guthrie? [150]

A. Yes.

Q. Did the records of the bank account maintained by the Interior Warehouse Company balance with those of the bank?

A. Yes, the bank account was brought—the book balance was brought into agreement or into reconciliation with the balance shown on the bank statement.

Q. Then for every debit that was made in any way there was a corresponding credit entered into the books, and always there was the contra item in all these entries?

A. Collectively. It was always placed in balance. For an adjustment of three debits there might be two credits balance it off, but the total of

(Testimony of Charles E. Rawlinson.)

those figures would always agree, the debit and the credit.

Q. Any time you listed the debits and listed the credits you always had a balance? A. Yes.

Q. Were these duplicate payments or forged checks that reflected themselves primarily in the payroll accounts of a quantity that made any marked difference in the cost of handling this grain, and so forth? Did they increase the cost to the point where the increase itself would challenge attention? A. No.

Q. Now, you said something on your direct examination about whether there were supporting entries in books of original entry for the ledger entries. Was there not in every case some supporting [151] document like an altered payroll or something that covered these?

A. No, there were two or three instances where a direct entry had been made in the ledger.

Q. Without even a——

A. (Interrupting): Without anything at all. An entry of that type would be extremely difficult to detect, particularly unless you made a detailed check of the transactions and ran onto the fact that there was no supporting evidence. For example, if you charged an account with \$75 in an expense account which would cover up \$75 taken out of the bank account, unless you happened to check that particular transaction it wouldn't come to the attention of anybody in particular. The company

(Testimony of Charles E. Rawlinson.)

wouldn't notice it in their review of the expense accounts.

Q. But for the most part there was some supporting document of some nature or some original entry that supported every ledger entry, was there not? A. Yes.

Mr. Jones: I think that is all.

The Witness: That question might take some elaboration on these 19 checks. You mentioned the words "some supporting evidence." I don't want there to be any misunderstanding. You were asking me if there was a direct entry in the ledger. Now you go back to support a transaction, and somewhere there is a stopping point. The entry in that ledger came from another book, which would be in this case the journal, or it might come from [152] the payroll summary. That payroll summary might not have some support.

Mr. Jones: That is all.

Mr. Wood: That is all, Mr. Rawlinson.

(Witness excused.) [153]

R. G. GRIFFIS

was thereupon recalled as a witness in behalf of the defendant herein, and testified further as follows:

Direct Examination

Mr. Wood: Mr. Norman, will you hand Mr.

(Testimony of R. G. Griffis.)

Griffis the audit—that is No. 3—and the dock time book—that is 23?

Q. (By Mr. Wood): Do you have the dock superintendent's time record?

A. The time book or the payroll?

Q. The time book. That is 23. Now Mr. Griffis, referring to the audit, Exhibit 3, particularly Schedule 1——

A. (Interrupting): What schedule is that?

Q. Schedule No. 1 under Exhibit A. Did you during the noon recess and at my request check those 21 checks first listed on Schedule 1 by number, and so on, against the original dock time book, Exhibit 23? A. Yes.

Q. How many of those 21 checks first listed on Schedule 1 did you find also listed in Exhibit 23, the dock time book?

Mr. Jaureguy: We want to make the same objection that we made before with respect to the time books, and that is, that there is no duty on the part of the depositor to compare checks with time books or to refer to these time books at all to determine whether or not the checks were all proper. It is incompetent, irrelevant, and immaterial. [154]

Mr. Wood: Those time books are the original source of the actual time itself, and I propose to show by the witness that with the exception of three out of that group none of those checks appear listed there at all.

The Court: He may answer.

(Testimony of R. G. Griffis.)

Mr. Wood: Read the question to Mr. Griffis, please.

The Court: But the Court isn't to be construed as ruling as to what the theory of the matter is except to explain the account. There is this account and the audit, and I think he has a right to put in the supporting documents and ask questions about the supporting documents.

Mr. Jaureguy: But his contention is that there is embezzlement here, which we contend did happen.

The Court: Well, if he proves your case——

Mr. Jaureguy (Interrupting): I am not casting any aspersions on him, but when he says he is trying to prove that these checks were issued to men for services they have not performed he is trying to prove the very thing that we are contending, and we can agree that that is the fact; we don't have to go to any books for it. If he was offering it for the purpose your Honor suggests, of attacking the accuracy of our audit, he is doing just exactly the opposite, to show that the audit means what we say it does, and therefore he is not offering it for any proper or admissible purpose.

The Court: Well, I think if he is proving your case for you [155] you have no objection. He may answer.

Mr. Wood: Will you read the question to Mr. Griffis?

(The question was read by the reporter.)

(Testimony of R. G. Griffis.)

A. There were three that—well, there was only one that was entered in the time book.

Q. (By Mr. Wood): Which one was that?

A. That is C. Clarkson on February 24, 1939.

Q. That is check No. 4653? A. Yes.

Q. That is the only one that you found entered out of those 21 in the dock timebook?

A. Yes, that appeared on the timebook.

Q. Now, look down below on Schedule 1 to those 12 checks listed there and let me know how many out of those 12 you found listed in the dock timebook, Exhibit 23.

A. There were two.

Q. Which ones were they, Mr. Griffis?

A. B. Stewart, Check 713 on June 24, 1937, and C. W. Carey on October 21, 1937, Check 1344.

Q. Those are the only two out of those 12 that you found on the dock timebook?

A. That is right.

Q. Now, you will note on the audit here the amount of C. W. Carey's check, No. 1344, was given as \$34.38. A. Yes. [156]

Q. What amount did you find that listed at in the dock timebook?

A. That was \$14.58.

Q. Now, referring to the other check you found listed on the dock timebook, No. 713 to B. Stewart, you note the audit lists that as \$30.94.

A. It was \$1.98.

Q. In the dock timebook? A. Yes.

(Testimony of R. G. Griffis.)

Q. Now, refer in the audit to the 37 checks listed there on Schedule 3.

A. Yes.

Q. And will you also refer to Exhibit 34, the duplicate payroll in the country, and the original payroll in the country, Exhibit 21, and let me know how many of those checks that are numbered on Schedule 3 of the audit appear upon the original country payroll sheets, Exhibit 21?

Mr. Jaureguy: We want to make the same objection that we made to the last series of questions respecting timebooks on the ground that there was no duty owed by the depositor to the bank to make any comparison between original payrolls and duplicate payrolls, or between duplicate payrolls and checks.

The Court: The Court admits the evidence, not on the assumption that there is any such duty, but because this whole account has been placed in here and it is still a question as to what the duty of the bank was under the circumstances. You may [157] answer.

Mr. Wood: Will you read the question?

(The question was read by the reporter.)

A. None of these check numbers appear on the payroll.

Q. (By Mr. Wood): Now, let me ask you, referring again to Schedule 3 of the audit, the 37 checks that are listed there, how many, if any, of those did you find listed on the duplicate payroll for the country, Exhibit 34?

(Testimony of R. G. Griffis.)

A. None of the check numbers.

Q. I believe you already stated that on the country payroll no timebook was kept.

A. Yes, to my knowledge. I haven't been out in the country.

Q. The carbons of the payroll sheets were the original time records out there?

A. Well, I haven't been out in the country. I wouldn't know.

Mr. Wood: You may cross-examine.

Cross-Examination

By Mr. Jones:

Q. When you say that there were no numbers on your carbon copies of the country payrolls you are referring to check numbers, aren't you?

A. That is right.

Q. And the check numbers were not put on the payrolls until after the checks were issued, were they? A. No. [158]

Q. And the only payroll that was at the office at the time the checks were issued was the original?

A. That is right.

Q. And that would be the place where the numbers were put. A. Yes.

Q. Now, look at the original payroll and see if these check numbers on Schedule 3 don't appear on the original payroll.

A. No, there is no check number appears on the payroll.

Q. Even on the country payroll?

(Testimony of R. G. Griffis.)

A. No, the amounts appear, but no check numbers.

Q. You have them on the dock payroll, do you not?

A. I don't know. If you will let me examine it I will tell you.

Q. Yes, look at it.

A. No, the check numbers don't appear on that either.

Q. What is that?

A. The check numbers were inserted at the time of the audit.

Q. Well, are there numbers on the country payrolls that were inserted at the time of the audit?

A. Yes.

Q. Well, that is the point. There were numbers on the country payrolls, but they were put on subsequent to the issuance of the check?

A. Yes.

Q. That is what I had in mind. Of course those checks were all issued from Portland, weren't they? [159]

A. Yes.

Q. And the carbon copy was up in the country when the checks were issued?

A. Yes.

Q. There was some statement that you made on direct examination that I didn't get the full import of with respect to Schedule 3, when you said that none of this was on the payroll. Now what did you mean by that statement?

A. I said none of the check numbers.

(Testimony of R. G. Griffis.)

Q. You were just referring to the numbers?

A. I said "check numbers."

Q. O. K. On Schedule 1—do you have Schedule 1 right there? A. Yes.

Q. We are talking about Schedule 1 of Exhibit No. 3. Your testimony in connection with this group of checks in Schedule 1 was based on your dock timebook, wasn't it?

A. Yes.

Q. In the dock timebook during the months when Price, Waterhouse would be doing their auditing in 1938 and '9 names of people who had been inserted on the dock payroll originals were also inserted in the timebooks, weren't they?

A. Well, they are erased now; it appears that they were. The writing does not appear there now on the timebook.

Q. From what is left there it is apparent that they were there once? [160]

A. Yes, upon scrutiny you can tell that they were there.

Q. Those entries then were made in the timebooks so that the timebooks would bear some information that had been inserted into the payroll for the same persons?

Mr. Wood: I didn't get that question.

The Court: Read the question.

(The question was read by the reporter.)

Q. (By Mr. Jones): In other words the timebooks had been made to harmonize with the changes in the payrolls? A. Yes.

(Testimony of R. G. Griffis.)

Mr. Jones: That is all. Thank you.

Redirect Examination

By Mr. Wood:

Q. Now, referring again, Mr. Griffis, to Schedule 3 in the audit, the checks listed there by name, numbers, dates, and amounts, do any of those checks there listed now or did they at any time appear upon either the originals or the carbons of the country payroll sheets, or upon anything else?

A. Not the check numbers.

Q. Not those particular checks that are listed?

A. Not those check numbers.

Q. And the same is true of the 21 checks and the 12 checks listed on Schedule 1 as far as the dock superintendent's time record is concerned, with the three exceptions noted by you in your testimony? [161]

A. Now, wait a minute. On Schedule 1 are we talking about check numbers again, or names?

Q. We are talking about the checks represented on Schedule 1.

Mr. Jaureguy: I want to object to that question. He said that several times—not intentionally so, but he would ask about checks, and the answer as subsequently developed would indicate that the witness was thinking of check numbers.

The Court: The witness is expressly testifying about check numbers; he isn't making any reference to anything else.

(Testimony of R. G. Griffis.)

Q. (By Mr. Wood): Look at Schedule 1 again. That first lists 21 checks? A. That is right.

Q. Now in connection with the superintendent's timebook, do any of those names——

A. (Interrupting): That is right. When we are talking about Schedule 1 we are talking about names.

Q. How about names as against the dock superintendent's timebook?

A. There was one.

Q. That was the one that you mentioned, C. Clarkson, for \$42? A. Yes.

Q. And the rest do not appear? Is that right?

A. That is right.

Q. And then as to the 12 checks at the bottom of Schedule 1, you said that two of them did appear—the names did appear [162] on the dock superintendent's timebook?

A. That is right.

Q. The one for C. W. Carey for \$34.38, which on the timebook appeared to be \$14.58?

A. That is right.

Q. And the one to B. Stewart for \$30.94, which on the timebook was \$1.98? A. Yes.

Q. Has the superintendent's timebook been made to conform at any time or does it now conform with the names and the amounts listed on Schedule 1?

A. Well, in this one case—no, they were raised.

Q. Is that the erasure you spoke about?

(Testimony of R. G. Griffis.)

A. The name had been erased.

Q. But with that one exception of these 21 and 12, which would be 33 checks, the timebook at no time did and does not now correspond with this Schedule 1?

A. There are two erasures.

Q. What is the other one?

A. C. W. Clark on March 11, 1938, and C. Warren on April 21, 1939.

Q. All right. Out of these 33 checks listed on Schedule 1 those two that you mentioned are the only ones which do appear at the present time upon the original dock payroll book?

A. Those two. The names have been erased.

[163]

Q. But they did at one time?

A. It appears that they have.

Q. And with that exception have any of the others on Schedule 1 appeared?

A. Yes, C. Clarkson on February 24th was entered and is still there.

Q. With those three exceptions, the two erasures and the one that is still there, have any of the names or checks or amounts listed on Schedule 1 ever been put upon the original superintendent's timebook?

A. No.

Mr. Wood: That is all.

Mr. Jones: May I see the timebook?

(The timebook was handed to Mr. Jones.)

(Testimony of R. G. Griffis.)

Recross Examination

By Mr. Jones:

Q. Whose writing is on the top of these little pink inserts? A. I don't know.

Q. Do you know the month that the check was made for in making the audit, the Price, Waterhouse test check for one month of the bank reconciliations? Aren't you on a calendar year basis?

A. No, March 31.

Q. Well, for the year ending March 31, 1939, what month would a test check for?

A. Probably March, 1939. [164]

Q. The last month? A. Yes.

Q. Then the February 24th check which you testified to on Schedule 1, the 2nd item, the Clarkson check, would be the only one that they would have to take care of the timebook on in order to correspond with the payroll, wouldn't it, as far as test checking is concerned?

A. February 24th?

Q. Yes. You see, there is none in March, '39.

A. No. There is one for April.

Q. Well, they took care of both April and February then? A. It appears that way.

Q. That will take care of the test check for '39. Now go to '38. What month did they test check for in '38?

A. I don't know. There is an erasure on March 11, 1938.

Q. I am making a check mark on the third line

(Testimony of R. G. Griffis.)

of the March 24th page here that is open, on the third line from the top. Now if you will notice, there is an erasure mark there. A. Yes.

Q. That is for the March 24th payroll, isn't it?

A. Yes.

Q. Dock. And the first initial shows as an "L", doesn't it? A. Yes.

Q. That could very well be the L. G. Cross that is right above the "C. W. Clark" that you mentioned on March 11th of Schedule 1? [165]

Mr. Wood: I object to that as calling for a conclusion of this witness, not being proper cross-examination, and a matter for the Court to determine.

The Court: Read me the question.

(The question was read by the reporter.)

The Court: The objection is sustained.

Q. (By Mr. Jones): Now, you have already testified about erasure marks and whose names they were there. I wish you to state if you can from your other records whose name was once inserted there at that erasure mark.

A. At this one (indicating)?

Q. Yes, that one that I just called out.

A. It could be L. G. Cross.

Q. And that would take care of fixing the time-book for the 1938 year as far as these checks are concerned, wouldn't it?

Mr. Wood: This witness has said, your Honor, he doesn't know what month the checks were made.

(Testimony of R. G. Griffis.)

A. I don't know what month the check was made. I wouldn't know.

Mr. Jones: Let it go.

The Court: Yes, I think if that is true the Court can answer that question just as well as the witness.

Mr. Jones: Please?

The Court: I say, I think if that would be true the Court could answer that question just as well as the witness.

Mr. Jones: Let it go. That is all. [166]

The Court: As a matter of fact, I shouldn't be surprised but what my inference and deduction would be more accurate.

Mr. Wood: That is all, Mr. Griffis.

(Witness excused.) [167]

G. L. CROWE

was thereupon recalled as a witness in behalf of the defendant herein, and testified further as follows:

Direct Examination

Q. Mr. Crowe, did your duties as an employee of the Interior include the duty to examine paid checks and notice the endorsements on the back that were returned from the bank?

Mr. Jaureguy: I object to that as calling for a conclusion of the witness.

(Testimony of G. L. Crowe.)

The Court: I didn't catch the exact phrasing. Will you read me the question?

(The question was read by the reporter.)

The Court: He may answer.

Mr. Jaureguy: Pardon me if I extend my objection a little further, your Honor.

The Court: Yes.

Mr. Jaureguy: On the further ground that notice to Crowe would not be notice to the Interior Warehouse Company, and therefore it could not be offered for that purpose.

The Court: I am not so sure about that. That is one of the questions that I will have to make up my mind about. I am going to let him answer the question, though.

Mr. Jaureguy: I take it, then that in overruling the objection you are not passing on that question.

The Court: I am not passing on that question. [168]

Mr. Wood: Do you wish the question read again, Mr. Crowe?

The Witness: Please.

(The question was read by the reporter.)

A. Yes, but I would like to elaborate on that question.

Mr. Wood: Explain it.

The Court: Make any explanation you wish.

The Witness: I scrutinized the endorsements on the returned checks for the express purpose of ascertaining that the fictitious checks had been returned

(Testimony of G. L. Crowe.)

from the bank, not for determining the validity of the other endorsements, the endorsements on the other checks.

The Court: The question was whether it was your duty.

A. It was my duty, yes.

Q. (By Mr. Wood): Of course as to the 126 checks involved here you knew that on each and every one of them it was a forged endorsement of the payee?

A. Yes.

Mr. Wood: Mr. Norman, will you kindly hand the witness Exhibit 24?

Q. Will you open the cover, please. Those have been identified as the Bank of California's statements to the Interior for the period of time embraced in this lawsuit. Was it part of your duty each month to obtain the bank statement from the bank?

A. Yes, sir.

Q. For the month of September, 1935 when would you obtain that [169] bank statement? About what time?

A. October 1st.

Q. And that would apply as to all of the bank statements which are in that box marked as Exhibit 24, that is, respectively? Each month it would operate that same way?

A. Yes, they would be obtained on the first of the following month.

Q. And you did in fact obtain those each of the following months?

A. With the exception of March 31st, which would be obtained by the auditors.

(Testimony of G. L. Crowe.)

Q. March 31st of 1939?

A. All years.

Q. Oh, each year? A. Yes.

Q. And with those exceptions you each month took delivery of those bank statements?

A. Yes, sir.

Q. And of the canceled checks represented by those bank statements? A. Yes, sir.

Q. Did you have a desk in Balfour, Guthrie's office, or did the Interior have a separate office?

A. No, I did have a desk in the office.

Q. A desk in Balfour, Guthrie's office?

A. Yes.

Q. There wasn't any separate office that you had for the Interior, [170] was there? A. No.

Q. Was there any separate office maintained for the Interior at all in Portland? A. No, sir.

Q. Except for these annual audits and the investigation in May of 1939 was your work in making up the payroll, having the girl make up the checks under your direction, taking them to the proper officers for signatures, taking them back for distribution, or any of your bookkeeping or documentary entries checked by any official, officer, or employee of the Interior?

Mr. Jaureguy: I object to that as incompetent, irrelevant, and immaterial. There is no duty on the part of the Interior to the defendant in this case to do any such checking.

The Court: I will allow him to answer.

(Testimony of G. L. Crowe.)

The Witness: Read the question again, please.

(The question was read by the reporter.)

A. Yes.

Q. (By Mr. Wood): What is that?

A. Yes, sir.

Q. By whom?

A. By either Mr. Lawson or Mr. Chrystall.

Q. How often was this check made?

A. That would be at their discretion. I had no way of determining how often they did check. As I would take the checks and payroll to them for signature it was at their discretion to check. [171]

Q. Was that as far as their check went, checks against the payroll?

Mr. Jaureguy: I object to that as calling for something not within the knowledge of the witness.

Q. (By Mr. Wood): As far as you know how much of a check was made by these gentlemen?

A. Just what I have stated.

Q. That is, checks against the payroll? Is that right?

A. Yes.

Q. Did you also work for Balfour, Guthrie as well as working for the Interior?

A. I was not an employee of the Interior.

Q. You were not an employee of the Interior?

A. No.

Q. By whom were you paid?

A. Balfour, Guthrie & Company.

Q. Entirely? A. Entirely.

(Testimony of G. L. Crowe.)

Q. Well, you did do this work for the Interior that you told about yesterday and today?

A. I worked on the books of the Interior Warehouse Company for Balfour, Guthrie & Company.

Mr. Jaureguy: I am sorry; I didn't get that.

The Court: Read the answer.

(The answer was read by the reporter.) [172]

Q. (By Mr. Wood): Did that work absorb all of your time? A. No, sir.

Q. Did it absorb the major portion or the minor portion of your time?

A. The minor portion.

Q. Most of your time was spent working for Balfour, Guthrie? A. Yes, sir.

Q. How much time each day approximately on an average would that be on the Interior records?

A. Over a period of thirty days, should I say?

Q. That will be all right.

A. One hour a day.

Q. And how long were your working days?

A. Seven hours.

Mr. Wood: You may cross-examine.

Cross-Examination

By Mr. Jones:

Q. All of the Portland people who worked in some way in connection with the Interior Warehouse Company were on the Balfour, Guthrie payroll rather than the Interior Warehouse, were they not? A. No, sir.

(Testimony of G. L. Crowe.)

Q. Were there some on the Interior Warehouse Company here in Portland?

A. Here in Portland? [173]

Q. In the main office. Do you know?

A. Yes, I know.

Q. Well, isn't it so that the office people down in the main office here by the Telephone Building down there where they have their head office—that the Portland employees in that office were paid by Balfour, Guthrie and were primarily Balfour, Guthrie employees?

A. I will have to ask a counter-question before I can answer that.

Q. What is that?

A. I will have to ask a counter-question before I can answer that.

Q. O. K.

A. Would you consider an officer of the company an employee?

Q. Yes, all of them, officers and employees and everybody else. They were all paid by Balfour, Guthrie, were they not?

A. No.

Q. Who was not?

A. The president of the company.

Q. The President of the Interior Warehouse?

A. Yes.

Q. He was on the Interior Warehouse payrolls?

A. He was paid by the Interior Warehouse Company.

Q. But the rest of them like Mr. Lawson and Mr. Chrystall were paid by Balfour, Guthrie? [174]

(Testimony of G. L. Crowe.)

A. Balfour, Guthrie employees, yes, sir.

The Court: I would like to have that situation a little further developed. I don't know whether I should take any hand in this and develop it myself. Are you drawing any distinction between the fact that this man was paid by Balfour, Guthrie as indicating that he wasn't performing his duties or didn't have any responsibility for the Interior?

Mr. Jones: No, we just followed it up because they had brought out that one exception, and I wanted to say—and am I not right in this—that the laboring men that worked for the Interior Warehouse Company like people handling grain in the country and the dock employees were all Interior Warehouse Company employees?

A. That is right.

Q. But for the most part the office crew in Portland, even though some of their time was devoted to Interior Warehouse Company work, was on the Balfour, Guthrie payroll? A. Very true.

Q. But working for Balfour, Guthrie, some of your duties were for the Interior Warehouse?

A. Yes.

The Court: I take it then that there is no claim on anyone's part that the duties that he performed were not duties for the Interior and responsibilities for the Interior?

Mr. Jones: Oh, no. [175] ..

The Court: All right.

Q. (By Mr. Jones): Now with reference to

(Testimony of G. L. Crowe.)

this reconciling of the bank balances, it was your duty when the bank statements and canceled checks were turned over to you on the first of the month for the preceding month to determine whether your books agreed with the bank's as far as money on hand was concerned? A. Yes.

Q. It also was part of your duty at the time to determine how many checks were still outstanding?

A. Yes.

Q. And then when you turned them over, if you did turn them over and look at the endorsements, it was merely to see as far as the valid checks were concerned that there was an endorsement by the payee, but you made no attempt to determine whether that was a bona fide endorsement or not?

A. No.

Q. And what you said about looking for spurious checks in here, or fictitious checks, as I think you called them, that was something that you were doing for yourself and not for the Interior Warehouse Company? A. That is right.

Q. You had no further duties as far as the Interior Warehouse Company was concerned in reconciling your bank account than merely to see that your books and the bank statement reconciled [176] and were the same? A. Yes.

Q. And to determine the number of outstanding checks? A. That was all.

Q. When you had done those two things, that is, reconciled your balances and determined the out-

(Testimony of G. L. Crowe.)

standing checks, your duties with reference to reconciliation as far as the Interior Warehouse Company was concerned were over? A. Yes.

Q. Now I believe that there was some testimony either this time or on your prior statements to the effect that part of the time you didn't get the payroll. By that you meant at the month of the annual audit? They went right to the auditors—I mean the bank statements—is that correct?

A. That is true.

Q. Then you got them eleven months out of the year and the auditors got them the test month?

A. Yes.

Q. It was only the test month then that you were particularly concerned about? A. Yes.

Q. You made no attempt to put in names then except for the test month?

A. That was all.

Mr. Jones: That is all. [177]

Redirect Examination

By Mr. Wood:

Q. But after the auditors received the bank statement for the one month in each year then it was lodged in your hands, was it not?

A. Yes.

Q. You had charge of all the bank statements?

A. Yes.

Q. Whether you got them initially yourself or whether the auditors got them that one month in each year?

(Testimony of G. L. Crowe.)

A. Yes, they were in my custody.

Q. Part of your duties consisted of reconciling the accounts from the bank statements? That was part of your work? A. Yes.

Q. Did you make all the deposits for the benefit and credit of the Interior?

A. No, I made no deposits.

Q. You made no deposits at all? A. No.

Q. You had no occasion to take checks for Balfour, Guthrie or checks made out to the Interior for deposit? A. No.

Q. Wasn't it done under your direction, that the checks were stamped with the Interior's endorsement?

A. No, I would merely request the deposit, but I would never [178] see the check.

Q. You would merely do what?

A. Request the deposit.

Q. But you wouldn't see the check?

A. No, sir.

Q. Somebody else would take care of that?

A. Yes.

Mr. Wood. That is all.

Mr. Jones: Along that line I will have to ask a few questions.

Recross-Examination

By Mr. Jones:

Q. Balfour, Guthrie & Company were substantially the treasurer for the Interior Warehouse Company, weren't they? A. Yes.

(Testimony of G. L. Crowe.)

Q. Now while your general ledger, and so forth, would show the earnings of the Interior Warehouse Company and you could determine at the end of a period of time what the earnings of the Interior Warehouse Company were, it didn't actually receive the money and handle the money itself? It had what was substantially a revolving fund, didn't it? A. Yes.

Q. The money from the warehouse receipts, that is, from storage charges, and so forth, would be paid directly to Balfour, Guthrie or endorsed over by the Interior Warehouse to Balfour, Guthrie?

[179]

A. Yes, that is true.

Q. And Balfour, Guthrie would deposit those funds in its own account, wouldn't it?

A. Yes.

Q. And all the funds in the bank that you ever maintained was a revolving fund of five or six hundred dollars for paying payroll checks?

A. Yes, sir.

Q. And maybe an insurance policy or something once in a while? A. Yes.

Q. Now then, when you needed money to cover your payroll and cover your expenses, when you needed money for that purpose you requisitioned it from Balfour, Guthrie's bank account, didn't you, or from Balfour, Guthrie? A. Yes.

Q. And then you told them, "My expenses today are going to amount to so much. I want enough money to cover checks for that sum"?

(Testimony of G. L. Crowe.)

A. Yes.

Mr. Jones: That is all.

Mr. Wood: That is all, Mr. Crowe.

The Court: Just a moment. Assuming that there was a check on which the name of Mr. Lawson, for instance, was forged, whose duty would it be to find that when the check was returned from the bank? [180]

A. That would be my duty.

The Court: Any cross-examination?

Mr. Jaureguy: I am sorry, I couldn't hear the question.

Mr. Jones: I didn't hear the question.

The Court: The question was, suppose the name of Mr. Lawson was forged on one of the checks and that check was returned by the bank, whose duty would it be to catch that, and the witness said it would be his duty. Do you desire to cross-examine on that?

(The attorneys for the plaintiffs conferred.)

Mr. Wood: I take it that I am not to call another witness. They haven't decided yet.

The Court: No, I want to clear this up first to see whether counsel has any cross-examination.

Mr. Jones: Just one moment.

The Court: Yes, surely.

(The attorneys for the plaintiffs conferred further.)

Q. (By Mr. Jones): You have been telling us about your duties, Mr. Crowe. How did you find out those duties?

(Testimony of G. L. Crowe.)

A. I was instructed in my duties by Mr. Lawson.

Q. Did Mr. Lawson at any time ever direct your attention to the possibility that there would be a forgery of either his name or Mr. Chrystall's or Mr. MacGregor's or Mr. Dickson's, the only people that signed checks, and direct your attention particularly to be on the alert for that? [181]

A. No.

Mr. Jones: That is all.

Mr. Wood: That is all, Mr. Crowe.

(Witness excused.) [182]

J. B. W. LAWSON

was thereupon recalled as a witness in behalf of the defendant herein, and testified further as follows:

Direct Examination

By Mr. Wood:

Q. Mr. Lawson, when was the Interior organized? A. I think it was 1900.

Q. Was this present system that is used now—or was used up to May of '39—put in when the corporation was organized?

A. It has been developed, but it is practically the same system.

Q. Did you or to your knowledge any other officer or employee of the Interior, with the exception

(Testimony of J. B. W. Lawson.)

of Price, Waterhouse, ever make any check or inspection of Mr. Crowe's work?

Mr. Jaureguy: I want to make the same objection that I made to the same question to Mr. Crowe, on the ground that there is no duty owed to the bank to make any check of the books.

The Court: With reference to that theory the Court believes that this is competent. It is an explanation of the whole situation. He may answer.

A. A trial balance was taken off by Crowe every month and shown to the bookkeeper of Balfour, Guthrie & Company to check the control in Balfour, Guthrie's books.

Q. That was Crowe's own trial balance?

A. Yes. —

Q. Was any check made back against that to see that it was proper? [183] A. No.

Q. Then with that one exception of this document furnished by Crowe, the trial balance, and the audits by Price, Waterhouse, and in addition the fact that you had the payroll checks and the payroll as you signed checks, you and Mr. Chrystall, was there to your knowledge any check or inspection of Crowe's work at any time during the period of his employ?

A. The only thing would be collaboration of those items.

Q. During that period of time did you ever notice any alterations in these pay sheets?

A. No.

(Testimony of J. B. W. Lawson.)

Q. You know now that there are some? Do you know that now?

A. From the evidence, yes.

Q. Did you ever require him to use indelible pencil or stylus ink on any of those records or pay sheets?

A. There were no instructions given on that point.

Q. You knew they were doing it in pencil, did you not?

A. I think indelible, for the dock at least.

Q. I imagine the other question answers it, but you had no occasion to check into these paid checks as they came back from the bank? A. No.

Q. And as far as you know did anyone else besides Crowe do that?

A. Do you mean the returned checks from the bank?

Q. Reconciling them. [184]

A. He reconciled them.

Q. Did anyone else do it to your knowledge?

A. I think it may have been done by someone else, but how often I couldn't say now.

Q. Was that part of his duties as an employee of the Interior? A. Yes.

Q. Did he ever call to your attention any irregular or improper checks during the period of his employ? A. No.

Q. Do you know who may have written "void" on those carbon copies of the lost checks? That is

(Testimony of J. B. W. Lawson.)

Exhibit 2. Such of them that have the word "void" on there, do you know who wrote that on?

A. I don't know.

Q. As I understand it, out in the country there were no timebooks such as the superintendent's dock book kept here.

A. Well, I don't know about that. I couldn't testify on that. There must have been some kind of a record of the agents.

Q. Wasn't there a carbon, that is, a duplicate original of the timebook sheet? Didn't that correspond with the timebook?

A. I don't know.

Q. Yesterday I think you testified that as you signed checks that you would check them against the payroll sheets. Is that right?

A. That is right.

Q. Did you at any time during Crowe's employ check the pay- [185] roll sheets on the dock against the superintendent's timebook?

Mr. Jones: The same objection, on the ground that we owed no duty to do that, and it is incompetent, irrelevant, and immaterial.

The Court: The Court overrules the objection on the same basis as heretofore stated.

Q. (By Mr. Wood): Did you do that?

A. What was the question, please?

Mr. Wood: Will you read it, Mr. Reporter?

(The question was read by the reporter.)

A. No.

Q. Did any officer or employee of the Interior ever do it to your knowledge?

(Testimony of J. B. W. Lawson.)

Mr. Jones: Same objection.

The Court: Same ruling.

A. I don't think so.

Q. (By Mr. Wood): Did anyone to your knowledge in the employ of the Interior ever check the paid checks against the superintendent's time-book?

Mr. Jones: Same objection.

The Court: Same ruling.

A. I don't think so.

Q. (By Mr. Wood): Did anyone in the employ of the Interior during the time covered by Crowe's employ ever check the paid country checks against the carbon copies of the payroll? [186]

Mr. Jones: Same objection.

The Court: Same ruling.

A. No.

Mr. Wood: You may cross-examine.

Cross-Examination

By Mr. Jones:

Q. Until this course of defalcation was brought out in May of 1939 was there anything that occurred that ever made you suspicious of the actions or conduct of Mr. Crowe? A. No.

Q. During the years from 1900, when you said the warehouse company was organized, down to this occasion, had there been any other defalcations of any kind? A. None.

Mr. Wood: I object to that as immaterial, and move to strike the answer.

(Testimony of J. B. W. Lawson.)

The Court: Overruled.

Q. (By Mr. Jones): Did Mr. Crowe come to you people with good recommendations?

A. Yes.

Mr. Jones: That is all.

Mr. Wood: That is all, Mr. Lawson.

(Witness excused.) [187]

A. M. CHRYSTALL

was thereupon recalled as a witness in behalf of the defendant, and testified further as follows:

Direct Examination

By Mr. Wood:

Q. Mr. Chrystall, do you know who marked as void on such of Exhibit 2 as may have been marked void? A. No.

Q. Do you know that it was Mr. Crowe's duty to reconcile the bank statement each month of the Interior? A. I believe it was, yes.

Q. When he would present checks to you for signature would he also furnish you with the original payroll sheet? A. Yes.

Q. And as you signed checks did you check the checks back against that sheet?

A. Yes, and count them up to see the number of checks.

Q. But in addition to the number against num-

(Testimony of A. M. Chrystall.)

ber, would you also check the amount and the dates and names? A. Not the dates.

Q. Would you check the names?

A. Yes.

Q. And then would you total up the number of checks against the total of the names appearing on the payroll sheets? A. Yes.

Q. Did you or any other officer or employee of the Interior to [188] your knowledge during the period covered by Crowe's employ ever check those payroll sheets against the dock superintendent's timebook?

Mr. Jones: The same objection.

The Court: Same ruling.

Q. (By Mr. Wood): Did you ever make that check, or any other employee of the Interior to your knowledge?

A. I can only talk for myself. I didn't.

Q. Did the same thing apply to the checking of the checks against the superintendent's original timebook?

Mr. Jones: Same objection.

The Court: Same ruling.

The Witness: What was the question?

Q. (By Mr. Wood) Would you give the same answer or would you wish to give a different answer to a checking of the paid checks against the superintendent's timebook?

A. No, I didn't check them.

(Testimony of A. M. Chrystall.)

Q. Do you know of anybody in the employ of the Interior who did?

A. I don't know.

Q. Did you or anyone in the employ of the Interior to your knowledge during the time of Crowe's employ ever check the paid checks back against the country payroll carbons?

Mr. Jaureguy: Same objection.

The Court: Same ruling.

Q. (By Mr. Wood) Did you ever do that? [189]

A. You mean the carbons they had in Portland or the carbons they had in the country?

Q. Any carbon of payroll sheets. A. No.

Q. Did anyone to your knowledge ever make a check?

A. I don't know.

Mr. Jones: We want the objection to go to that last question too.

The Court: The ruling is the same.

Q. (By Mr. Wood) Do you know whether or not the original payroll books as distinguished from sheets—the original timebooks as distinguished from payroll sheets—were kept out in the country?

A. The agents have a method of keeping track of the work performed in each warehouse.

Q. Isn't that the payroll sheets? Isn't that the record?

A. No, that is the payroll. They make up their payroll from this record.

Q. And that record is similar to the dock superintendent's timebook, is it?

(Testimony of A. M. Chrystall.)

A. Not necessarily, no.

Q. But they do have an original record?

A. They have to have some record of the time spent, naturally.

Q. Did you or anyone else in the employ or representing the Interior at any time during the period of Crowe's employ ever [190] check the country payroll sheets, the originals, against these records that you now speak of?

Mr. Jones: Same objection.

The Court: Same ruling.

A. I didn't.

Q. (By Mr. Wood) Do you know if anyone else did? A. I don't know.

Q. Did anyone except Mr. Crowe reconcile these bank statements and inspect these canceled checks?

A. I couldn't tell you that.

Q. Did you ever do it at any time?

A. No, that is not my job.

Q. Do you know that it was part of his job?

A. I am not acquainted with what he had to do, no.

Mr. Wood: You may cross-examine.

Mr. Jones: No cross-examination.

Mr. Wood: That is all.

(Witness excused.) [191]

E. F. MUNLY

was thereupon produced as a witness in behalf of the defendant herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wood:

Q. Your name is E. L. Munly? A. E. F.

Q. E. F. Munly. I beg your pardon. What is your position with the Bank of California, Mr. Munly? A. Assistant manager.

Q. That is at which branch?

A. At the Portland branch.

Q. How long have you had that position?

A. About three years.

Q. And were you with the bank before that?

A. Yes.

A. Also in the same branch? A. Yes.

Q. In what capacity?

A. Just prior to that I was auditor for about ten years.

Q. And you are still in the bank's employ?

A. Yes.

Q. As an officer, assistant manager? A. Yes.

Q. Are you able to tell the Court over the period from September 1, 1935 to May 2, 1939 approximately the number of checks that [192] would be cleared through the bank each day in the way of paying those checks?

Mr. Jones: I object to that as incompetent, irrelevant, immaterial, and in no way bearing upon any of the issues of this case.

(Testimony of E. F. Munly.)

The Court: He may answer.

A. Well, of course during that period we have increased our business, so now there is more than there was the first part of that period, but right at the present time there is between eight and ten thousand checks that go through a day.

Q. (By Mr. Wood) How does that compare with the daily number of checks in the period I mentioned? Was it somewhat less at that time?

A. Perhaps a little less.

Mr. Jones: The same objection.

Q. (By Mr. Wood) Is it the custom of the bank now, or has it ever been, when a check is presented to it purportedly endorsed by the payee named on the face, to require the presence of that payee at the bank or to send a representative of the bank out to the payee to ascertain whether or not that is his signature?

Mr. Jones: We object to any reference to custom on the ground that custom has not been pleaded or made an issue in this case. We object to it further on the ground that it is incompetent, irrelevant, and immaterial. [193]

Mr. Wood: We don't claim it for custom. We hope to show the mechanics of operating in that method.

The Court: I think it is incompetent for this reason that I think the rule of law may have something to do with it, irrespective of what the facts are. I think perhaps you assume that duty, al-

(Testimony of E. F. Munly.)

though I am not definitely ruling on that. I think the evidence is incompetent. Your duties depend on the duties that you are charged with by law, and not custom.

Mr. Wood: That is true, your Honor. The only reason I ask the question is that in the authorities that point was run into, and if it was applicable there I think it would be applicable here. It is mechanically impossible to do that.

The Court: Well, I don't think it makes much difference if you are charged with it by law whether it is impossible or not.

Q. (By Mr. Wood) In paying the checks involved here, Mr. Munly, are you able to state whether or not the bank believed that the respective payees named in those checks were then employees of the Interior Warehouse?

Mr. Jones: I object to that as incompetent, immaterial, and irrelevant, on the ground that they are charged with a positive duty upon which they assume the complete risk of knowing that, and their belief has nothing whatever to do with the case.

The Court: I don't think that is true regarding the question whether they are employed or not; I don't think that makes much [194] difference, but he may answer.

A. Yes, we do believe that the payees—we did believe it in this case.

Q. (By Mr. Wood) Did the bank in paying these several checks in suit here rely upon all of the respective endorsements appearing upon the checks?

(Testimony of E. F. Munly.)

A. Yes.

Q. Did you make a check of these books and records and documents that are in court here at my request?

A. Yes.

Q. Did you make it with Mr. I. D. Wood, an accountant?

A. Yes.

Mr. Wood: Mr. Bailiff, will you hand him the audit, No. 3, the original that is in evidence?

Q. Referring to Schedule 1, Mr. Munly, of that audit, Schedule 1 attached to Exhibit A, you find the first group of checks there, 21 checks listed. As to those 21 checks I will ask you whether or not you checked them back against the dock superintendent's timebook.

A. Yes.

Q. How many out of those 21 did you find in the dock superintendent's timebook?

Mr. Jaureguy: We want to make the same objection that we made to Mr. Griffis' testimony, on the same ground, that there is no duty on the part of the Interior to have ascertained the [195] existence or non-existence or those names, and the existence or non-existence of those names on the timebook would in no way have any bearing on the breach of any duty owed by the Interior to the bank.

The Court: I allowed that question as to the employees or officers of the Interior Warehouse Company, and also to explain the audit, but as to this witness, he didn't make the audit and he is not connected with the Interior Warehouse Company.

Mr. Wood: You may cross-examine.

(Testimony of E. F. Munly.)

Cross-Examination

By Mr. Jones:

Q. You said you relied on prior endorsements. Will you explain that a little more fully? What did you mean by relying on prior endorsements?

A. Well, we rely on everything about a check when it is presented, on all endorsements, and the drawer of the check, and everything about the check.

Q. Some of these checks, as a matter of fact, I think two of them, didn't pass through a clearing house; they were endorsed directly at your bank. Did you rely on prior endorsements there?

A. We didn't relinquish any rights against the prior endorsement. I don't know, because I didn't cash those checks, from my own personal knowledge—I don't know whether that payee was there at the time these were cashed. I do recall seeing more than one endorsement on the checks. [196]

Q. Now as a matter of fact what you were relying on was in most instances the clearinghouse stamp, wasn't it?

A. As I say, we rely on all of the endorsements on the checks. When we pay any check we get the endorsement of the party to whom we make the payment as a receipt.

Q. What do you mean by relying on a prior endorsement?

A. Well, that we have certain legal rights against all of the endorser.

(Testimony of E. F. Munly.)

Q. Then what you mean by the word "reliance" is that you are willing to cash the check because you are willing to look to the prior endorsers?

The Court: Well, perhaps you had better tell the witness what you mean by the word "reliance". You asked him in the first place whether he relied upon it, or what he relied on, or something of that sort, and he is answering as I understand it the question that you made about reliance.

Mr. Jones: Well, if the Court please, I was taking that from his direct examination. He said he had relied on the prior endorsements, and I am trying to find out what he means by relying.

The Court: I may have been mistaken.

Q. (By Mr. Jones) You are a member of the Portland Clearing House, aren't you?

A. Yes.

Q. And it is a practice of banks that are members of the Portland [197] Clearing House to accept the Clearing House stamp as a guaranty of prior endorsements, isn't it?

A. Just the same as any endorsement is a guaranty of prior endorsements.

Q. But as a matter of fact there is a Clearing House rule to that effect, isn't there?

A. I can't say from my recollection whether it is in the Clearing House rules or not.

Q. Do you recall a rule to the effect that the Clearing House stamp shall guarantee previous endorsements on all items cleared except on certificates of deposit?

(Testimony of E. F. Munly.)

Mr. Wood: I object to that as incompetent, irrelevant, immaterial, and not proper cross-examination.

The Court: He may answer.

A. I presume you are reading from the Portland Clearing House rules. My best testimony would be if I could see the book.

Mr. Jones: Yes, you may see the book. Mr. Bailiff, would you hand him this book?

(The book was handed to the witness.)

A. Those words appear here.

Q. That is the rule? A. Yes.

Q. Now supposing there isn't any Clearing House stamp on a check. There wasn't on a few of these, but they were deposited right directly into your bank. Then what did you do? [198]

A. The party who received the money from us would be required to endorse the check.

Q. Yes, but what about the payee? How did you go about determining the authenticity of the payee's endorsement?

A. We didn't determine the authenticity of the payee's endorsement.

Q. Why not?

A. Well, it is impractical. As I stated a little earlier, we have between eight and ten thousand items that go through, and the banking business couldn't be conducted if the bank was required to have the payee there and pay the money to the payee only.

(Testimony of E. F. Munly.)

Q. And in addition you were relying on the other endorsements?

A. We rely on all of the endorsements.

Mr. Jones: That is all.

Redirect Examination

By Mr. Wood:

Q. Just a minute, Mr. Munly. Do you know when that rule that Mr. Jones directed your attention to went into effect? Does that book state?

The Court: Oh, I think counsel can stipulate that that is the rule.

A. I don't think there is any question but what that is the rule.

Mr. Wood: That is all.

The Court: I think we are wasting a lot of time.
(Witness excused.) [199]

I. D. WOOD

was thereupon produced as a witness in behalf of the defendant herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Borden Wood:

Q. Your name is I. D. Wood? A. Yes, sir

Q. What is your occupation, Mr. Wood?

A. Certified public accountant.

Q. Where are your offices?

A. In the Mayer Building.

(Testimony of I. D. Wood.)

Q. In Portland? A. Yes, sir.

Q. How long have you been a certified public accountant in Oregon? A. Since 1921.

Q. Were you at any time president of the Oregon Association of C.P.A.'s? A. Yes, sir.

Q. Do you hold that office now?

A. As president?

Q. Yes. A. No, sir.

Q. Did you at my request examine the documents and papers which are in issue here marked Pre-Trial Exhibits 19 to 35, inclusive, [200] except 35 and 32, which have been ruled out? Did you examine all those books and records?

A. I glanced through some of the records in the court the other day.

Q. And that was at my request? A. Yes.

Q. By the way, you and I are not related?

A. No, sir.

Q. That is the first time I had the chance to deny the relation. Tell me, in making that examination did you make any test checks? Tell me first, what is a test check in accountancy?

A. Well, in accountancy most of the auditing is done by test checking. It would not be practical to do a detailed check of every item from the expense standpoint and the time involved, so it is usually by test checking, and if that does not uncover anything it is accepted as satisfactory and that everything is correct.

Q. Did you make a test check on these documents?

(Testimony of I. D. Wood.)

A. I glanced through some of them and made test checks of certain items.

Mr. Borden Wood: Will you let the witness have Exhibit 3, please?

Q. Referring to Schedule 1, the first 21 checks there, did you make a check of those against the superintendent's time record?

Mr. Jaureguy: I want to object to that on the ground that it [201] is incompetent, irrelevant, and immaterial, and there is no duty on the part of the Interior Warehouse to obtain such a test check—no duty owing to the bank.

Mr. Wood: This is merely corroborative of Griffis' testimony made by a competent C.P.A.

Mr. Jaureguy: I call the Court's attention to the fact that I made the same objection when Mr. Griffis was on the stand, but I think you perhaps admitted it on some other theory than that that we had in our mind.

The Court: The objection is sustained.

Q. (By Mr. Borden Wood): Do you have occasion in connection with the practice of your profession to audit the books and records of a great many concerns?

A. Yes, sir.

Q. Small and large?

A. Yes, sir.

Q. I will ask you whether or not in your opinion as a C.P.A. it connotes with modern accountancy, and did from 1935 to 1939, to have but one man detailed to the duties of getting up the payrolls, having checks on payrolls made up, procuring the sig-

(Testimony of I. D. Wood.)

natures to the checks by a properly authorized officer, rechecking delivery of the signed checks, in charge of the duty of distribution, at the end of the month securing the paid checks, reconciling the bank account, and making all of the entries in the books pertaining thereto. [202]

Mr. Jaureguy: I object to that on the ground that it is incompetent, irrelevant, and immaterial, on the ground that there was no duty owed by the Interior to the Bank of California to install a system which connotes, I think he said, with modern accounting practice, and second, that some of the items mentioned by counsel certainly were not matters on which the Interior owed a duty to the Bank of California. By that I mean that we object to each one separately. There was no duty to perform one of those duties or all of them in combination.

The Court: The objection is sustained, and upon the ground that it is asking expert testimony upon a question of negligence that the Court has to decide in the final analysis.

Q. (By Mr. Borden Wood): Did your examination of these books and records disclose erasures or alterations made in them?

A. We noticed on the timebooks——

Mr. Jaureguy (Interrupting): I think we are entitled to a "yes" or "no" answer.

The Witness: May I have the question?

(The question was read by the reporter.)

(Testimony of I. D. Wood.)

A. Yes, sir.

Q. (By Mr. Borden Wood): Did you find erasures and alterations in those records?

A. Yes, sir.

Q. What is the difference between a test check and a detailed yearly audit? [203]

Mr. Jones: Just a minute; we object to that on the ground that it is incompetent, irrelevant, and immaterial and on the fact that the thing has all been gone into as far as the audit that was made was concerned. I would like to incorporate as grounds of this objection those just made by Mr. Jaureguy and would like to add to them this: That there is no duty on the part of any depositor to maintain any set of books for the benefit of any bank beyond the stub book or the carbon copies of the checks.

The Court: The trouble is, I don't think the testimony is being offered on these checks. That has been true all the way through. My theory is this: In your case you did talk about test checks and detailed audits, and so forth. I think there may be a difference in the theories that your witnesses advanced, and this defendant has a right to go into that. He may answer.

The Witness: May I have that question again?
(The question was read by the reporter.)

A. The way that question is worded, I may have to explain a little bit. The question states "a detailed yearly audit". I presume it means an an-

(Testimony of I. D. Wood.)

nual audit. There is a detailed audit which happens where there is something uncovered, where you check every item, but as a rule a detailed annual audit is a complete audit in which an audit is made by test checking, not checking every item, but making your test sufficient to satisfy yourself that everything is correct.

Q. Is a balance sheet audit a thorough one or a superficial one?

Mr. Jaureguy: I object to that as calling for a conclusion of the witness.

The Court: He is testifying as an expert. He may answer.

Mr. Jones: I would like to add to that objection the fact that a balance sheet audit, whether it is a thorough one or not, may depend entirely upon the particular auditor doing it and what the purpose of the balance sheet audit is.

The Court: You may argue that to the Court.

A. A balance sheet audit can be a thorough audit, but it is only presenting a status as of one date. It covers operations only over a certain period. A balance sheet audit would present the status as at March 31st, as in this case, or December 31st, or some particular date, but it would not cover the operations for the year.

Q. (By Mr. Borden Wood): It would just be based on the balance sheet?

A. Based on the financial status of the company at a certain time.

(Testimony of I. D. Wood.)

Mr. Borden Wood: You may cross-examine.

Mr. Jones: No cross-examination.

Mr. Borden Wood: That is all, Mr. Wood.

(Witness excused.)

Mr. Wood: Your Honor, that is the defendant's case. We rest. [205]

The Court: Do you have some testimony?

Mr. Jones: We also rest, and I wonder—the hour is rather late. I could hardly conclude before five o'clock, and I wonder if it wouldn't be a little better—I can probably sum this up in shorter time if I had the evening to organize my—

The Court (Interrupting): I could probably hear this argument in the morning, but I personally would rather have the matter briefed and submitted on briefs, and then if I feel it is necessary to have an oral argument I could call for it later.

Mr. Jones: That would be very agreeable with us.

Mr. Wood: That is satisfactory to us.

The Court: I would rather do that. I would rather have counsel study it before I have an oral argument.

Mr. Wood: Does your Honor wish to set time limits now in getting those in?

The Court: Yes, I will be glad to do that.

Mr. Jones: Your Honor, I was out of town for seven or eight straight weeks, and I have still two matters to settle with the State and Federal Government. I wonder if I could have under the circumstances about fifteen days.

Mr. Wood: That is all right, your Honor, and fifteen days for us to answer?

The Court: That will be sometime in April.

Mr. Wood: Ten would be satisfactory to us. Perhaps you can give Mr. Jones fifteen and I can get mine in in ten days. [206]

The Court: Well, I will extend to you the same time as Mr. Jones, but if you wish to put it in earlier I can take it under advisement sooner.

Mr. Jones: And if we can get our brief in sooner than fifteen days we will do it. We will do it just as rapidly as possible.

The Court: Yes, I think that will fall about right. My time in April is pretty well scheduled and I doubt if I can consider the detailed facts before then in any event, but I will extend at this time fifteen days to plaintiffs, and fifteen days after their brief comes in to the defendant. Do you desire any reply brief?

Mr. Jones: Five days for the reply brief.

The Court: All right; and if I am not satisfied after having read the briefs—I will probably read them as they come in preliminarily, and if I have any questions then I will call for an oral argument and set it down. The case will not be submitted until I advise you or call for an oral argument. In that connection, though, there are some things that may not be very well formulated in my own mind, and there are some questions that I would like to have you consider. One of those is this: What is the effect of the negotiable instruments law re-

garding checks written to non-existent or fictitious persons? I notice that there are some endorsers on these checks that are in the 107 in evidence, and I was wondering if there was any [207] duty on the Court to order their inclusion in this lawsuit.

Mr. Jaureguy: You say inclusion in this lawsuit?

The Court: Yes.

Mr. Jaureguy: Everybody here has been hoping somebody would get them in, but nobody has done it.

The Court: Well, I have kind of thought everybody thought the water was cold, and I was wondering whether it was my duty to order them in.

Mr. Jaureguy: I may say our position has been—if the Court cares to hear it——

The Court: Yes.

Mr. Jaureguy: Our position has been this, that the drawer of a check does not himself have a right of action against a person claiming under a forged endorsement who has collected from the bank, on the ground that where the payee's endorsement is forged the drawer's money is still in the bank and he can have no complaint against somebody who has collected on a spurious endorsement. I will say that there is some authority to the contrary, but whatever authority there is to the contrary, I can only reconcile it on this theory, that if we sue the endorser we certify the payment that the bank made, and so even on the theory of those who say we can sue such a person who gets it from the bank,

if we did go after him it would be on the ground that we are abandoning any action that we have against the bank. That is the only reason that we didn't make an effort to bring them in, although it has been our hope [208] before this case was over that they would be brought in. I think I speak for both plaintiffs here when I say that it has been our hope that the endorsers would get in, so that if your Honor found the bank was not liable they could be. It is also my theory that if on account of any of the contentions made in the affirmative answer the bank is not liable, then we are subrogated to the rights of the bank against their endorsers, and if this Court should hold that the bank is not liable then we would pursue that theory, although I must say I haven't found any decisions to support that. I think as far as we are concerned, we very much would like to see them in—and still would.

The Court: I have this theory, that I am given the power and the duty under the rules in certain circumstances to require persons to be brought into court that I think will completely settle one controversy. It seems to me that you can hardly divorce the rights of the endorsees. Assuming that this Court should hold that the bank were liable, then the position of the endorsees is to my mind prejudiced by that determination.

Mr. Jaureguy: I might say that there are several cases—I suppose it is unnecessary to tell your Honor—from other jurisdictions under various

state practices similar to the Federal practice where that has been done.

The Court: I have made no study of the question at all, but it occurred to me during the course of this case that it [209] might be prejudicial—I don't mean directly prejudicial, but it might be indirectly prejudicial to the rights of the endorsees——

Mr. Jaureguy (Interrupting): Yes, I think that is true.

The Court (Continuing): ——if I should make a determination of some of these defenses without their presence.

Mr. Jaureguy: There is this too, your Honor, that in this case all the endorsers can be brought in, whereas if this case is terminated without them being brought in it would mean that somebody—either the bank or us—will have to bring several different lawsuits against the endorsers, because I don't see under what theory the bank could bring in all the endorsers in one lawsuit or that we could; whereas in this case they could all be brought in.

Mr. Wood: They can't be all brought in, because on the 19 missing ones no one knows who the endorsers are. We think if the plaintiffs had that desire they could have expressed it in their complaint in the first instance.

Mr. Jaureguy: I would like to hear from Mr. Wood what his opinion is on that.

Mr. Wood: Well, you could have brought them in. There is no reason why we should have to bring them in here.

Mr. Jaureguy: I suggest that we are not entitled to any censure for not bringing them in, because nobody has pointed out any theory under which we could have joined them and joined the [210] bank.

The Court: The Court is not censuring you.

Mr. Jaureguy: No, but I don't like to even have Mr. Wood censure me.

Mr. Wood: I am not censuring you.

Mr. Jones: I should like to read one of the paragraphs that I think answers most of the questions that come up, insofar as the plaintiffs are concerned. It is the case——

The Court (Interrupting): Mr. Jones, I am just suggesting the question now.

Mr. Jones: This is the point I want to call to your attention. Even if these collecting banks were brought in, or the other prior endorsers, they have no right and cannot suggest that the Bank of California even set up such defenses as they did as against the plaintiffs. If there were any defenses such as they set up they are entirely between the plaintiffs and the Bank of California, and there is nothing that has been done here that is to the prejudice of any endorser or any collecting bank such as the First or the United States National, because it has been directly held that they cannot insist on even the Bank of California stating those defenses, if they are defenses.

The Court: I am speaking of this realistically, not talking about the legal principles. One point that has interested me in the case is the effect of

these bank statements and the apparent limitation that is placed on them. I would like to see [211] if there is any authority on that, and have that point briefed.

There have been suggestions at various times in the case as to whose money the bank was paying and whether they were paying their own or whether they were paying somebody's else, and I want that point briefed and cleared up so that I will have my mind clear on the basis of that. I think that may not have much to do with the final determination of it, but for the theoretical basis of determination I want to know what the parties think about that; whose funds were being paid out by the bank.

Now I take some interest in another question too, and that is: What effect is it going to have where you find one of these checks endorsed by Crowe? Those are a separate series. They are comparatively few, but there are some. What effect is that going to have? I also noticed one where he is the second endorser, and the third endorser. I didn't make close enough check to find whether any were presented by Crowe himself at a bank. I think there were none. If there were any I would like to have that circumstance also covered.

Now since we have finished the trial of the case I am going to give you an idea of what I was thinking about as to some of the testimony. The theory I have in the back of my mind is not the theory of negligence. The duty of a bank is squarely raised; also I think the duty of the Interior to the

bank. Without defining what those duties are I want you to brief the ques- [212] tion of whether these checks were not issued to fictitious, non-existent payees by the Interior; in other words, a responsible employe of the Interior, charged with the duty of distribution—whether or not the Interior did not issue the checks to the persons to whom they were intended and whether the intent of the signer of the check had anything to do with it. That last I think is an interesting and complicated question.

If there is nothing more, Gentlemen, the court is now adjourned until tomorrow morning at ten o'clock.

Mr. Jones: It is stipulated by and between the parties hereto that the Interior Warehouse Company may take out its journal and ledger upon condition that they are brought back in the same condition that they now are on order of the Court or request of any of the parties.

Mr. Miller: It is so stipulated.

The Court: And the Court so directs, based on the stipulation.

(Thereupon, at 4:45 o'clock P.M., March 27, 1941 the trial of the above entitled cause was concluded.) [213]

[Title of District Court and Cause.]

REPORTER'S CERTIFICATE

I, Edwin L. Holmes, hereby certify that I reported in shorthand the testimony and proceedings on the trial of the above entitled cause, that I subsequently caused my said shorthand notes to be reduced to typewriting, and that the foregoing transcript, Pages 1 to 213, both inclusive, constitutes a full, true, and accurate transcript of said testimony and proceedings, so taken by me in shorthand as aforesaid, and of the whole thereof.

Dated at Portland, Oregon, this 14th day of May, 1942.

EDWIN L. HOLMES

Reporter.

[Endorsed]: Filed July 9, 1942. [214]

[Endorsed]: No. 10188. United States Circuit Court of Appeals for the Ninth Circuit. American Surety Company, a Corporation, and E. L. McDougal, Appellants, vs. The Bank of California, National Association, a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed July 9, 1942.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10188

AMERICAN SURETY COMPANY OF NEW
YORK, a corporation, and E. L. McDOUGAL,
Appellants,

vs.

THE BANK OF CALIFORNIA, NATIONAL
ASSOCIATION, a corporation,
Appellee.

STATEMENT OF POINTS TO BE RELIED
ON BY APPELLANTS

Pursuant to rule 19 (6) of the Rules of this Court the appellants, American Surety Company of New York and E. L. McDougal, present the following statement of the points on which they intend to rely on this appeal:

(1) The District Court had jurisdiction of this cause.

(2) Findings of Fact Nos. I, II, III, IV and V entered by the trial court correctly set forth facts of this case as established by the evidence.

(3) Finding of Fact No. VI entered by the trial court correctly sets forth facts of this case as established by the evidence, except the last paragraph thereof in which it is stated that there is no evidence of any of the endorsements on the back of the nineteen checks referred to in said finding other

than the oral testimony of Garth L. Crowe, and appellants contend that there is other evidence of said endorsements and that said endorsements were forgeries.

(4) Findings of Fact Nos. VII, VIII, IX, X, XI, XII and XIII entered by the trial court correctly set forth facts of this case as established by the evidence.

(5) Finding of Fact No. XIV entered by the trial court is erroneous and does not accurately set forth any facts established by the evidence in this case. It is the contention of the appellants that the discovery of the negotiations and cashing of said checks by said Crowe was discovered by Interior Warehouse Company within a reasonable time after the negotiations and cashing of said checks, and it is further the contention of appellants that is such discovery was not made within such reasonable time this fact is entirely immaterial in this case, since any such failure to discover was not the proximate cause of the loss.

(6) Finding of Fact No. XV entered by the trial court does not accurately or correctly set forth any facts established by the evidence, and the evidence does not prove the appellee was not guilty of any negligence or wrongdoing in the cashing of said checks, or any of them, or in charging the same or any of them to the account of said Interior Warehouse Company, but the evidence affirmatively establishes such negligence and wrongdoing in cashing said checks and in charging the same to the

account of Interior Warehouse Company. Appellants further contend that even though it should appear that the appellee was not guilty of negligence such fact is immaterial in this case, since the obligation of appellee bank to cash only checks having the proper endorsement was a contractual obligation, for the violation of which appellee was liable regardless of negligence or lack of negligence.

(7) The Conclusions of Law Nos. I and II entered by the trial court are correct conclusions of law and are applicable in this case.

(8) Conclusion of Law No. III entered by the trial court is an incorrect statement of the law and is based upon a misapprehension of the facts in this case. It is the position of the appellants not only that Interior Warehouse Company did discover the negotiations and cashing of said checks within a reasonable time thereafter, but also that any such failure would not justify a denial of recovery against appellee in this case.

(9) Conclusion of Law No. IV entered by the trial court is incorrect and erroneous in that it assumes that the principle of election of remedies is a partially satisfactory solution of this case. The position of appellants is that the principle of election of remedies is in no way involved in this case.

(10) Appellants agree with Conclusion of Law No. V entered by the trial court insofar as said conclusion states that there are independent contractual liabilities each running in favor of Interior Warehouse Company; but appellants contend that

the conclusion of law set forth in the second paragraph of said conclusion that the satisfaction of the obligation upon said insurance policies by appellants did not give rise to a legal or equitable, or any, right in appellants to recover against appellee is erroneous, and appellants contend that the satisfaction of such obligation by said insurance companies gave rise by subrogation, or assignment, or both, to a right of action on the part of said insurance companies against appellee.

(11) Appellants agree with Conclusion of Law No. VI entered by the trial court, except the following portions thereof:

That portion of Conclusion VI in which the court states:

“The fact that Interior Warehouse Company may have had another remedy against defendant on a different contract if Crowe had not been insured does not render defendant liable to the insurers, who as to it stand in the same position as Crowe.”

and also the following conclusion of law

“The Interior Warehouse Company suffered no loss, and there was no claim against defendant which could be assigned or which could inure to the insurers, or either of them, for subrogation.”

It is the position of appellants that the payment of said loss under said insurance contracts resulted in subrogating said insurance companies to the right of Interior Warehouse Company against appellee bank.

(12) Conclusion of Law No. VII entered by the trial court is an incorrect conclusion of law and it is the position of appellants that because of the principles of assignment and subrogation appellants, and both of them, are entitled to recover from defendant in this case.

(13) Conclusion of Law No. VIII entered by the trial court is erroneous, it being the position of appellants that judgment should not have been entered in favor of appellee, but that judgment should have been entered in favor of appellants and against appellee.

(14) It is the further position of appellants that the court erred in entering the final judgment, dated January 20, 1942, signed by the Honorable James Alger Fee, Judge of said Court, which said judgment dismissed appellants' complaint and gave judgment for appellee for its costs and disbursements.

(15) The court erred in failing to enter judgment in favor of appellants, and the court should have entered judgment in favor of appellants, as prayed for in appellants' complaint.

Respectfully submitted

PLOWDEN STOTT, NICHOLAS
JAUREGUY

MAURICE D. SUSSMAN, E. L.
McDOUGAL

Attorneys for Appellants.

Due and legal service of the foregoing Statement of Points to be Relied on by Appellants is hereby acknowledged at Portland, Multnomah County, Oregon, this 10th day of July, 1942, by receipt of a duly certified copy there of as required by law.

BORDEN WOOD

Of Attorneys for Appellee

[Endorsed]: Filed July 13, 1942.

[Title of Circuit Court of Appeals and Cause.]

APPLICATION FOR PERMISSION TO OMIT
CERTAIN EXHIBITS FROM PRINTING
AND AFFIDAVIT IN SUPPORT THERE-
OF.

American Surety Company of New York, a corporation, and E. L. McDougal, appellants, hereby respectfully make application for an order dispensing with the necessity of printing the exhibits transmitted to this Court by the District Court, reserving, however, the right to all parties to refer to said exhibits in their briefs and arguments by reference to the original exhibits and to that end represent:

1. The exhibits forwarded to this court by the District Court are bulky or otherwise unsuitable for printing as they consist of numerous checks, general ledgers and journals, payroll sheets, time books,

bank statements, duplicate payroll checks, expense reports, and similar lengthy books and documents, and said exhibits are principally material by reason of inferences which it may be claimed can be drawn from methods of conducting business as disclosed therein rather than the contents of any particular items.

2. As it may become necessary in presenting the appeal to refer to certain of said exhibits in their original form, appellants request that any order dispensing with the necessity of printing allow the parties to refer to said exhibits in their briefs and arguments by reference to the original exhibits.

Wherefore, appellants respectfully request that the order hereinabove requested be made.

Dated: San Francisco, July 9th, 1942.

MAURICE D. SUSSMAN

E. L. McDOUGAL

PLOWDEN STOTT

NICHOLAS JAUREGUY

Attorneys for Appellants

(Duly verified.)

State of Oregon

County of Multnomah—ss.

Due and legal service of the foregoing Application is hereby acknowledged at Portland, Multnomah County, Oregon, this 10th day of July, 1942, by receipt of a duly certified copy thereof as required by law.

BORDEN WOOD

Of Attorneys for Appellee

So ordered:

FRANCIS A. GARRECHT

United States Circuit Judge

[Endorsed]: Filed Jul 13, 1942.

No. 10188

2

**In the United States
Circuit Court of Appeals
For the Ninth Circuit**

AMERICAN SURETY COMPANY, a Corporation, and
E. L. McDUGAL, *Appellants,*

vs.

THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION,
a Corporation, *Appellee.*

Appellants' Brief

Upon Appeal from the District Court of the United States
for the District of Oregon

HONORABLE JAMES J. FEE, District Judge

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American Bank Building, Portland, Oregon,
Attorneys for Appellee.

FILED

SEP 10 1912

PAUL P. O'BRIEN,
CLERK



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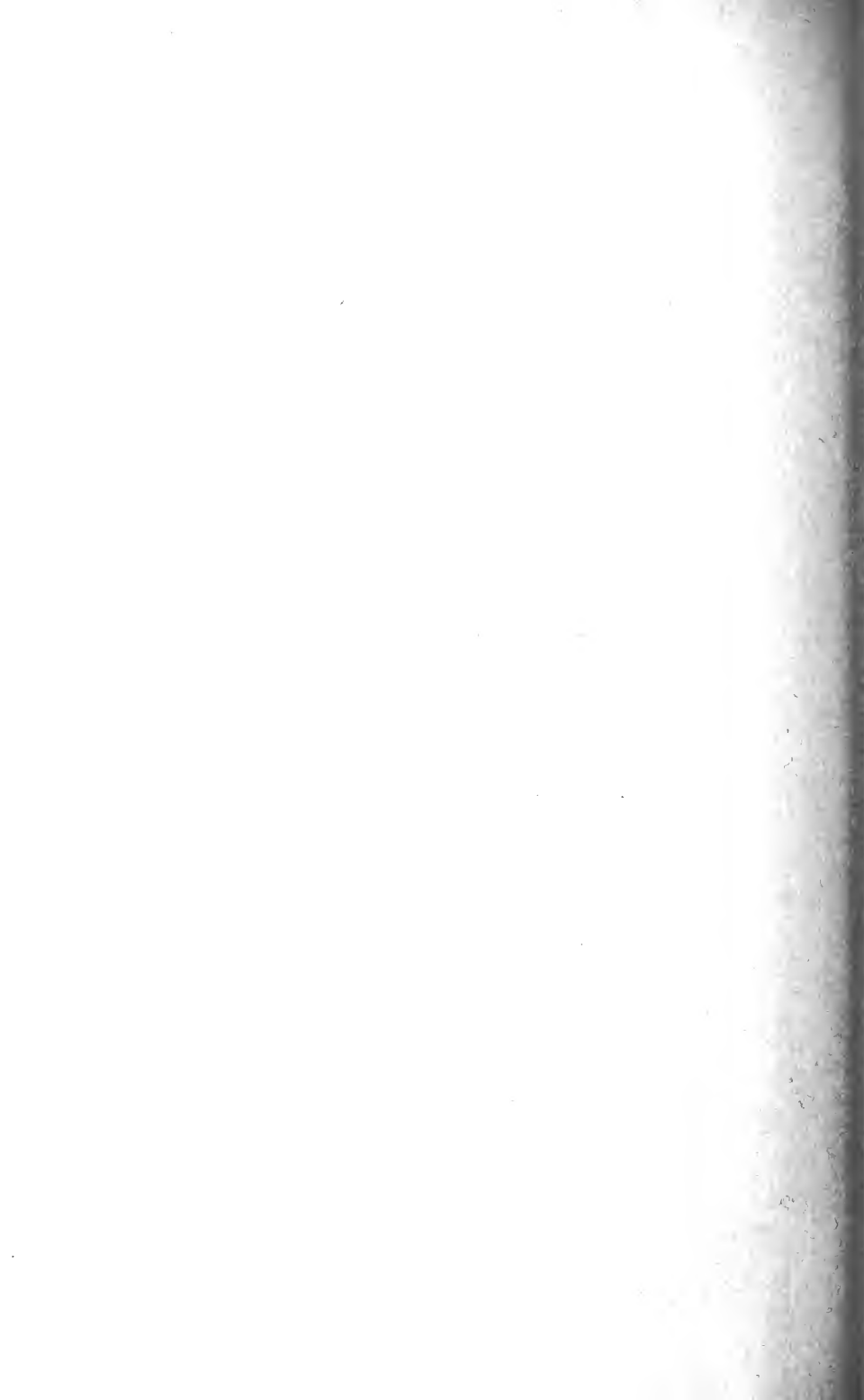
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No. 10188

**In the United States
Circuit Court of Appeals
For the Ninth Circuit**

AMERICAN SURETY COMPANY, a Corporation, and
E. L. McDOUGAL, *Appellants,*

vs.

THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION,
a Corporation, *Appellee.*

Appellants' Brief

Upon Appeal from the District Court of the United States
for the District of Oregon

HONORABLE JAMES J. FEE, District Judge

JURISDICTION OF THE DISTRICT COURT

While the decision of the District Court was upon the merits, that court holding that it had jurisdiction (Tr. 43), it should be stated that such jurisdiction was at the outset contested by appellee. The jurisdiction of the District Court is based upon 28 U.S.C.A., Sec. 41, Subd. (1) and (16). Plaintiff American Surety Company is a New York corporation and plaintiff E. L. McDougal

is a resident and citizen of Oregon. Defendant is a national banking association. Its home office and principal place of business is in the City of San Francisco, State of California, "with branches at Portland, Multnomah County, Oregon," and other places (Tr. 13-4, 215). 28 U.S.C.A., Sec. 41, Subd. (16), provides that for the purpose of determining diversity of citizenship national banking associations shall "be deemed citizens of the state in which they are respectively located."

A motion to dismiss (Tr. 11-3) filed by defendant included as one of the grounds alleged lack of jurisdiction, the motion stating (Tr. 11) that "defendant may have been, for the purposes of this cause, also a citizen and resident of the State of Oregon. Defendant suggests that the court lacked jurisdiction in that at the time of the institution of this cause Interior Warehouse Company, plaintiff E. L. McDougal, and defendant, and each of them, may have been citizens and residents of the same state."

This motion was denied (Tr. 43, 65), and we submit that the decision of the trial court taking jurisdiction was correct. While neither side could find any decisions directly in point, we believe the following authorities clearly show that jurisdiction exists: *Zollman Banks and Banking*, Section 881, et seq.; *Petri vs. Commercial National Bank*, 142 U. S. 644, 12 S. Ct. 325, 35 L. Ed.

1144; *First National Bank vs. Hozier*, 267 U. S. 276, 45 S. Ct. 261, 69 L. Ed. 609; *New England National Bank vs. Calhoun*, 9 F. (2d) 272; *St. Louis & S. R. R. Co. vs. James*, 161 U. S. 545, 16 S. Ct. 621, 40 L. Ed. 802; *Southern Railway Co. vs. Allison*, 190 U. S. 326, 23 S. Ct. 713, 47 L. Ed. 1078.

The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

JURISDICTION OF THE CIRCUIT COURT OF APPEALS

The jurisdiction of the Circuit Court of Appeals to review the judgment of the District Court (Tr. 68) is based upon 28 U.S.C.A., Sec. 225, it being a final decision in the District Court, a direct review of which may not be had in the Supreme Court under 28 U.S. C.A., Sec. 345.

STATEMENT OF THE CASE

This case involves the right of the American Surety Co. and E. L. McDougal, as an assignee of Lloyds of London, to recover from the Bank of California, hereinafter referred to as "the bank," the sum of \$6,562.33, which the bank deducted and charged to the funds of the Interior Warehouse Company, its depositor, upon

the bank's payment of checks drawn by said depositor, which checks bore forged indorsements of the payees named thereon.

Between September 1st, 1935, and May 2nd, 1939, the Interior Warehouse Company was a depositor of the bank, with funds on deposit at all times during said period (Tr. 45). During said time it had in its employ one G. L. Crowe, who was a bookkeeper and payroll clerk and who had charge of the payroll of his employer, and in such capacity had charge of the distribution of payroll checks to certain of the employees. He would receive payroll records of superintendents in charge of the employees working at the company's dock and also at the company's country warehouses. It was his duty to have checks prepared for the various persons named in the payrolls and present said checks to the proper officers of his employer who were authorized to sign the checks drawn by the company (Tr. 150, 151, 154). In presenting these checks to the person authorized to sign same, Crowe represented that the persons named in said checks were on the payroll and entitled to be paid the amounts specified in said checks, and at the same time he also presented the payrolls in which the names of the payees appeared as employees of the company and the amounts opposite their names on the payrolls corresponded with the amounts stated on the face of the

checks. The officers who signed said checks intended them as payment to the payees named therein (Tr. 169, 152, 154, 157). When the checks were signed, they were returned to Crowe for the purpose of delivery to the persons named therein as payees.

During the above period, September 1st, 1935, and May 2nd, 1939, Crowe had checks made out to the order of various named persons, some of whom were former employees, some of whom were present employees who had already been paid, and some of whom were non-existent and fictitious persons (Tr. 60, 61, Plaintiff's Exhibit 3, Tr. 221-232). When these checks were signed and given to him for delivery to the persons named therein, all of which had been represented by him to be present employees to whom the company was indebted, he kept the checks, forged the names of the payees named therein and then cashed them (Tr. 169-171, 236, 237). Between said dates, he did this to 126 checks, forging the name of the payee on each one. These checks totalled \$6,562.33 (Tr. 61).

Sixty-three (63) of these checks aggregating in amount \$3,996.53 represented payments to country employees of the Interior Warehouse Company who were paid by said company by other means (Tr. 60).

Twenty-one (21) of said checks aggregating \$812.24 in amount represented payments to fictitious persons who

never were authentic employees of said Interior Warehouse Company (Tr. 60).

Twelve (12) of said checks aggregating \$433.58 in amount represented payments to existing persons who previously had been, but no longer were, authentic employees of said Interior Warehouse Company and who had previously been paid by said company for their services (Tr. 60).

Eleven (11) of said checks aggregating \$369.59 in amount represented payments to Portland, Oregon, dock employees of said Interior Warehouse Company who previously had been or later were paid by said company by other means (Tr. 61).

The original of nineteen (19) of said checks aggregating \$950.39 in amount represented payments to employees of said Interior Warehouse Company, who were paid by said company by other means, were destroyed by Crowe, so as to these nineteen the record does not show where he had them cashed (Tr. 59, 61). Of the remaining one hundred seven (107) he cashed ninety (90) of them at Meier & Frank Co., Inc., a large department store in Portland, eight (8) of them at Lipman Wolfe & Co., another large department store, and the remaining nine (9) by presentation to others. Only one (1) check did he present directly to the Bank of California after indorsing it again by writing his true name (Tr. 46-58).

These one hundred seven (107) checks reached the

defendant bank in the following manner: Fifty-nine (59) were presented to the bank through the Portland Clearing House by the First National Bank, each check bearing the clearing house indorsement; thirty-seven (37) were presented to the bank through the Portland Clearing House by the United States National Bank, each check bearing the clearing house indorsement. These checks also bore prior indorsements subsequent to the forged indorsements of the payees. Nine (9) checks were presented to the Bank of California by Meier & Frank Co., Inc., where they had been cashed, and the two (2) remaining checks of this number were presented to the Bank of California, one by Crowe and one by an individual named Guindon (Tr. 46-58).

The amounts of these various checks bearing the forged indorsements of the payees were charged by the bank to the account of the Interior Warehouse Company. When the forgeries were discovered in May of 1939, the Interior Warehouse Company notified the bank and no further checks with forged indorsements were paid by it (Tr. 106).

The Interior Warehouse Company employed Price Waterhouse & Co., accountants, to audit their books. These accountants audited the books of the company at various times during the time Crowe worked for them and when these checks were drawn (Tr. 137, 142). No

discovery of the forged indorsements was made either by Interior Warehouse Company or the auditors until May, 1939. In the course of an audit during that month an accountant of Price Waterhouse & Co. noticed a coincident fact that a cancelled check which had been returned by the bank, and which check was payable to a laborer in eastern Washington, bore under the indorsement the Portland address of his personal friend. This discovery led to a discovery of all the transactions covering the forged checks. (Tr. 109).

During all of this time the Interior Warehouse Company had a policy of insurance with the plaintiff, American Surety Company of New York, which insured the Interior Warehouse Company against loss it might sustain by reason of fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction or willful misapplication of any of its employees, including Crowe. This policy of insurance was executed and delivered to Interior Warehouse Company in consideration of a premium paid by it, and not by the employees, to said insurer. The Interior Warehouse Company also had a policy of insurance with the Underwriters at Lloyds of London insuring it for any such loss that it might sustain, which policy was in excess of the limits provided for in the policy of the American Surety Company and for it the Interior Warehouse Company and not the employees paid a

premium directly to the Underwriters. Following the discovery that these checks had been forged and that the bank had deducted the sum of \$6,562.33, the American Surety Company paid the Interior Warehouse Company the sum of \$1,000.00, the limit of its policy, as and for a loss under same, and the Underwriters at Lloyds of London paid the Interior Warehouse Company the sum of \$5,562.33 as and for a loss under its said policy of insurance (Tr. 98). Thereafter, Lloyds of London assigned any and all its rights of subrogation by reason of its payment under said policy to E. L. McDougal, plaintiff.

The case was tried by the court sitting without intervention of a jury and thereafter the court made Findings of Fact and Conclusions of Law and entered judgment thereon in favor of appellee. (Tr. 44, 68) from which judgment this appeal is taken.

SPECIFICATIONS OF ERROR

1. The court erred in Finding of Fact VI (Tr. 59-60) in stating that, with respect to the eighteen checks of which the originals were not introduced in evidence, there was no evidence "of any of the endorsements on the back thereof, if any, other than the oral testimony of Garth L. Crowe that he endorsed the names of said respective payees on the several checks"; and appellants contend that there is other evidence in the record regard-

ing said endorsements, and that said endorsements were clearly forgeries. This specification of error is probably immaterial in view of Finding of Fact VII (Tr. 60) that the names of payees in all checks involved "were forged by the said Garth L. Crowe."

2. The court erred in entering Finding of Fact XIV (Tr. 64) to the effect that Interior Warehouse Company did not discover the negotiation and cashing of said checks by said Crowe within a reasonable time after the negotiation and cashing of the same, and that Interior Warehouse Company thereby misled defendant and the prior endorsers on said checks. It is the contention of appellants that the discovery of the negotiation and cashing of said checks by said Crowe was, in view of all the facts and circumstances, within a reasonable time. Appellants further contend that the evidence conclusively proves that any failure to discover said negotiation and cashing of said checks was not the proximate cause of the losses in this case.

3. The court erred in Finding of Fact XV (Tr. 64) in which the court found that defendant was not guilty of any negligence or wrongdoing in the cashing of said checks, or any of them, or in charging them to the account of Interior Warehouse Company in defendant bank and in further finding that defendant was not involved in any manner in the misconduct of said Crowe

in his negotiation and cashing of said checks, or any of them. Appellants contend that these findings are erroneous and because the evidence conclusively proves that defendant was guilty of negligence and, more important, was guilty of a violation of a positive duty owed by defendant to Interior Warehouse Company in that in the case of each of said checks defendant wrongfully charged the same against Interior Warehouse Company, although, as the evidence proved and the court found, the payee's endorsement on each of said checks was forged. Appellants further contend that such violation of duty rendered defendant liable to Interior Warehouse Company regardless of negligence, but also contends that the evidence discloses that defendant was negligent in cashing each of said checks.

4. The court erred in Conclusion of Law III (Tr. 65) in holding that "the better view of the law is that the failure of Interior Warehouse Company to discover the negotiation and cashing of said checks by said Crowe within a reasonable time thereafter justifies a denial of recovery against defendant herein either on principles of negligence of Interior Warehouse Company or estoppel against it." Appellants contend that (1) said conclusion of law is based on the erroneous assumption of fact that Interior Warehouse Company failed to discover said negotiation and cashing within a reasonable time;

and (2) even had such been the fact such fact would not justify a denial of recovery against defendant either on principles of negligence or on principles of estoppel.

5. The court erred in Conclusion of Law IV (Tr. 65) in holding that the principle of election of remedies has any application to this case. While it is true that Interior Warehouse Company had the right either to proceed against defendant or to recover from the insurers upon their respective insurance policies, the election to recover from the insurers and the consequent payment of the loss by the insurers transferred to insurers by subrogation all remedies which Interior Warehouse Company otherwise had against defendant.

6. The court erred in Conclusion of Law V (Tr. 66) in which the court held that the fact that there were two "independent contractual obligations" in favor of Interior Warehouse Company prevents the doctrine of subrogation from being applicable, and that the payment by insurers "did not give rise to a real or equitable or any right in them or their assignee or assignees to recover against defendant in this cause." It is the position of appellants that despite the existence of "independent contractual obligations," the doctrines of subrogation are applicable.

7. The court erred in Conclusion of Law VI (Tr. 66-67) in holding that

“The fact that Interior Warehouse Company may have had another remedy against defendant on a different contract if Crowe had not been insured does not render defendant liable to the insurers, who as to it stand in the same position as Crowe.”

It is the position of appellants that the insurers do not “stand in the same position as Crowe,” but rather that insurers stand in the same position as Interior Warehouse Company, and that insurers were therefore subrogated to the rights not of Crowe but of Interior Warehouse Company.

The court also erred in said Conclusion of Law VI in holding that as a result of said payment by insurers, “there was no claim against defendant which could be assigned or which could inure to the insurers or either of them, by subrogation.” It is the position of appellants that the very fact of payment resulted in insurers being subrogated to the claim of Interior Warehouse Company against defendant.

8. The court erred in Conclusion of Law VII (Tr. 67) in holding that appellants are not entitled to recover either on principles of assignment or on principles of subrogation. The grounds of this error are the same as those stated in the preceding specifications 4, 5, 6 and 7.

9. The court erred in Conclusion of Law VIII (Tr. 67) in holding that judgment should be entered in favor

of defendant and against plaintiff, for the reasons hereinbefore stated.

10. The court erred in failing to enter judgment in favor of appellants, and in entering judgment in favor of appellee (Tr. 68-69).

SUMMARY OF ARGUMENT

On the merits, this case involves two questions, (1) Is the bank liable to its depositor for the sum of \$6,562.33 which it charged to its depositor's account in making payment of these 126 checks, the payees' endorsements of which were forged? and (2) Are the appellants by reason of their payments to the depositor, their assured, subrogated to its right to collect said sum from the bank? All the issues presented by the pre-trial order deal with a determination of these two primary questions which are before this Court for its determination.

It is the contention of the appellants that the checks involved were "order" instruments and the bank in paying same when the indorsements thereon were forged and charging the amounts thereof from the deposit account of the drawer, Interior Warehouse Company, breached its contract with its depositor and became liable to it for the amount of money it thus wrongfully charged to said account.

It is likewise the position and contention of appellants that upon the payment by the American Surety Company and Lloyds of London of the said sum of \$6,562.33 to the Interior Warehouse Company, pursuant to the provisions of their respective policies, the said American Surety Company and Lloyds of London became subrogated to the rights of the Interior Warehouse Company against the defendant bank. E. L. McDougal, by reason of the assignment, has succeeded to said rights of Lloyds of London. At the time the payments were made to it by its insurers, the Interior Warehouse Company was entitled to recover the said sum of \$6,562.33 from defendant bank and under the right of subrogation, plaintiffs are entitled to a judgment against the bank for said sum.

ARGUMENT

The law dealing with the relationship between a bank and its depositor and the rights, duties and liabilities as between them is established and well settled. (See Appendix A.) There is nothing new or novel about the facts of this case nor the methods pursued by the defalcating employee Crowe. The scheme employed by him has been attempted and carried out by many employees of large concerns in various parts of the country and there are numerous decisions of the courts in various

jurisdictions dealing with the legal problems present in the instant case. Under the authority of these cases, which will be discussed and called to the Court's attention, and the facts in this case as disclosed by the Transcript of Record, appellants are entitled to a judgment against appellee.

I. LIABILITY OF THE BANK

The Contract Relationship Between a Bank and Its Depositor

The making of a deposit by a depositor in a bank for the purpose of drawing checks thereon creates a relationship between the bank and the depositor which rests upon contract. The bank by the mere act of accepting the deposit becomes bound by law from the fact of the deposit of the money to repay it on the depositor's demand or order to the persons to whose order the checks are drawn, and to them only, *Zollman, Banks & Banking*, Sec. 3332. The New York Court of Appeals in the leading case of *Shipman et al vs. Bank of State of New York*, 126 N. Y. 318, 27 N. E. 371, said:

“The various deposits of money, made from time to time by the plaintiffs with the defendant, created the relation of debtor and creditors, and the law implies a contract on the part of the defendant to disburse the money standing to the plaintiffs' credit only upon their order and in conformity with their directions. The defendant is not entitled to charge against

the plaintiffs' account any sums as payments, unless they have been made to such persons as the plaintiffs directed. Such payments as were made without the order of the plaintiffs of their funds by the defendant afford to it no protection, when called upon by the plaintiffs to account for the money deposited."

A similar statement of this rule is made by the Supreme Judicial Court of Massachusetts in the case of *Jordan Marsh Co. vs. National Shawmut Bank*, 201 Mass. 408, 87 N. E. 740:

"The implied contract between the banker and his depositors in regard to the depositor's checks is that the banker will pay them from his deposit to the persons to whom he orders payment to be made. When a definite order is made in the check, the duty of the banker is absolute, as a general rule, to pay only in accordance with the order."

In the recent case of *Board of Education vs. National Union Bank*, 16 N. J. M. 50, 196 A. 352, Affd., 121 N. J. L. 177, 1 A. (2d) 383, the Supreme Court of New Jersey stated:

"... the implied contract on the part of the defendant bank that it would disburse the money standing to the credit of the board (the depositor) only on its order and in conformity with its directions, and when it paid the checks in question, to which the names of the necessary indorsers had been forged, it must be considered as having paid out its own funds and could not charge the account with the amount."

At page 829 the Supreme Court of Illinois in the case of *United States C. S. Co. vs. Central Mfg. Dist. Bank*, 343 Ill. 503, 175 N. E. 825, said:

“Out of the relation of debtor and creditor existing between banks and their depositors, the law implies the contract on the part of the bank to pay the depositor’s checks, to the amount of his deposit, to the persons to whom he orders payment to be made. If the check is made payable to the order of a person named, the duty of the bank is absolute to pay only to the payee or according to his order. No amount of care to avoid error will protect the bank from liability, if it pays the check to a wrong person, and it must ascertain and act upon the genuineness of the indorsement at its peril.” (Citations of cases omitted.)

The same principle is recognized and set forth by the Supreme Court of California in the case of *Los Angeles Invest. Co. vs. Home Savings Bank*, 180 Cal. 601, 182 P. 293, 5 A.L.R. 1193; by the Supreme Court of Michigan in *Detroit P. R. Co. vs. Wayne County and H. Sav. Bank*, 252 Mich. 163, 233 N. W. 185, 75 A.L.R. 1273, and by the Supreme Court of Missouri in the case of *American Sash & Door Co. vs. Commerce Trust Co.*, 332 Mo. 98, 56 S. W. (2d) 1034.

The United States Supreme Court, in *Leather Manufacturers’ Bank vs. Merchants’ Bank*, 128 U. S. 26, at page 34, 9 S. Ct. 3, 4, 32 L. Ed. 342, states the rule governing the relation of a bank and its depositor as follows:

“Its obligation to the depositor is only to pay out an equal amount upon his demand or order; and proof of refusal or neglect to pay upon such demand or order is necessary to sustain an action by the depositor against the bank. The bank cannot discharge its liability to account with the depositor to the extent of the deposit, except by payment to him, or to the holder of a written order from him, usually in the form of a check. *If the bank pays out money to the holder of a check upon which the name of the depositor, or of a payee or indorsee, is forged, it is simply no payment as between the bank and the depositor; and the legal state of the account between them, and the legal liability of the bank to him, remain just as if the pretended payment had not been made.*” (Emphasis ours.)

See also *United States v. National Bank of Commerce*, (C.C.A. 9th) 205 F. 433.

In each of the above cases (except *Leather Mfrs. Bank vs. Merchants' Bank*, supra), a dishonest employee of a depositor by a fraudulent scheme similar to that used by Crowe secured checks payable to designated payees and thereon forged the indorsement of the named payee. In each of these cases the court dealt with practically every legal question now before this court.

Banks Specific Duty to Pay Only on a Genuine Indorsement

The above discussed duty of the bank imposes upon the bank the specific duty of determining at its own peril the genuineness of the payee's indorsement. In the

case of *Shipman et al vs. Bank of State of New York, supra*, the court said:

“The defendant’s contract was to pay the checks only upon a genuine indorsement. The drawer is not presumed to know, and in fact seldom does know, the signature of the payee. *The bank must, at its own peril, determine that question.*” (Emphasis ours.)

In the case of *Jordan Marsh Co. vs. National Shawmut Bank, supra*, in speaking upon precisely the same question, the court said:

“If the payment is to be made to the order of a person named in the check, and if he orders the payment to be made to another person, it is the duty of the banker to see that the signature of the payee is genuine.” (Cases cited omitted.) . . . “*This rule of law applies as well to payments made by a banker through the clearing house as to payments made over the counter. The duty is the same and the performance of it is as important in one case as in the other. If the methods of the clearing house are a convenience to bankers in the transaction of their business, and the bank on which a check is drawn chooses to pay on a guaranty of the indorsement of the payee’s name by another responsible bank, this does not affect the duty of a paying bank to its depositor. It simply indicates a willingness of the bank to disregard and neglect the duty, upon the guaranty of a responsible party that the duty has already been perfectly performed for it by a preceding party from whom the check has been received . . .*” (Emphasis ours.)

See also the quotation from the *United States C. S. Co. vs. Central Mfg. Dist. Bank, supra*.

From these authorities it is apparent that the duty to detect the forgery of the payee's name is an absolute duty assumed by the bank arising from its contract with its depositor. The drawee bank is duty bound to the drawer not to pay an order instrument unless it is properly indorsed by the payee or his duly authorized agent. It cannot escape this duty owing to its depositor by its reliance upon the integrity and indorsements of subsequent indorsers or the indorsement of a member bank of the same clearing house. Such reliance by it in its commercial dealings with such indorsers and member banks is a matter between it and them, but that does not relieve it from this positive contractual duty owing its depositor to pay only on the order of the payee. The duty to detect the forgery of the payee's name is a risk assumed by the bank arising from its contract with its depositor. If it sees fit to rely upon the endorsement of the party who cashed the check in the first instance, or subsequent indorsers, such reliance does not in any way release it of its primary obligation to the depositor. As between the bank and its depositor the loss falls upon the bank.

Such is the situation in the instant case. As a practical matter, it may be that this is the only way a bank in a large city may proceed, but such rule is one of expediency and necessity in the maintenance of checking accounts and in order to obtain the full benefit and

convenience of the system of commercial banking, and the use of negotiable instruments, in which system the appellee bank is a part and from which it derives its existence and benefits.

Any apparent harshness of such rule disappears in view of the equally settled and well established rule of negotiable instruments that each indorser guarantees the genuineness of prior indorsements. *O.C.L.A.*, Secs. 69-506, 69-507; *First Nat. Bank vs. United States Nat. Bank*, 100 Or. 264, 197 P. 547. Under the facts in this case the bank had an absolute right to obtain complete recovery from the member banks of the clearing house and other indorsers subsequent to the forged indorsement for the sums it paid out, who in turn would have a right of recourse against prior indorsers. And under the Rules of Civil Procedure, it could have brought in as parties in the instant case those who were liable to it. In this way the liability for this loss would have been placed upon those directly responsible for it, namely those who dealt with the forger.

The Checks Are "Order" Instruments

The checks involved in this case are not "bearer" instruments, but "order" instruments. Some were made payable to living persons. In some the payees named were non-existent persons—the names used as payees

were fictitious. All the checks were prepared under Crowe's direction. All were signed by duly authorized officers of the Interior Warehouse Company, who at the time of signing the checks believed that the Interior Warehouse Company was indebted to living persons—their employees—named as payees in the checks for the respective amounts thereof. They intended the checks for the payees named therein and did not know that any of the checks were drawn payable to non-existent persons. They also intended and believed that the checks would be delivered to the persons named therein as payees. (Tr. 150-152, 155, 156.)

It is the intention of the drawer of the checks that controls and that makes these checks "order" instruments. In this case it was the intention of the men who signed the checks that controlled—not the intentions of the faithless servant who presented the prepared but unsigned checks to these officers. Checks made payable to the order of fictitious persons are "bearer" instruments only when the person signing the checks knows of that fact, and intends to make the checks payable to a fictitious person. The Negotiable Instruments Act (Sec. 9-3) provides that an instrument payable to a "fictitious or non-existing person" is payable to bearer only when "such fact was known to the person making it so payable." (O.C.L.A., Sec. 69-109.)

The knowledge of Crowe is not imputable to the Interior Warehouse Company.

A clear statement of the law dealing with this question is found in 9 C.J.S. at p. 740, which statement is amply supported by the cases cited (see also 1941 Pocket Part) and is set forth fully in Appendix B to this brief.

In holding that the knowledge of the agent is not imputable to the drawer of the check, the court in *United States C. S. C. vs. Central Mfg. Dist. Bank, supra* (343 Ill. 503, 175 N. E. 825), quoting from *Los Angeles Investment Co. vs. Home Savings Bank, supra* (180 Cal. 601, 182 P. 293), stated:

“ . . . The point in this case is that the checks were not executed by the guilty agent; we are not concerned with an act done by him within the scope of his authority, and therefore his guilty intent and knowledge are not the intent and knowledge of his principal. The intent and the knowledge of the principal was, as we have said, that of the officers who drew the checks, and they were wholly innocent of any intention of drawing checks to fictitious payees.”

In practically every one of the cases above cited, where a scheme such as that employed by Crowe was followed, the dishonest employee had checks made out to non-existent persons as well as existing persons to whom the depositor did not owe any money. But in said cases as in the instant case the person authorized

to sign the checks was led to believe by the fraudulent acts of the faithless employee that the named payee was in fact a real person entitled to be paid the amount of the check.

In *Shipman et al vs. Bank of State of New York, supra* (126 N. Y. 318, 27 N. E. 371), the checks were filled up (not signed) by one Dodge, the cashier, from a written statement made by Bedell, the dishonest employee, showing the amount to be paid plaintiffs' clients and the basis for said payment. After filling up the checks Dodge would take the check book with the filled up checks, to a member of plaintiffs' firm for signature, showing him the supporting documents for the payment and the statement of Bedell as to the payments to be made. Thereupon, the checks would be signed by the plaintiffs, in the name of the individual partner to whom it was presented by Dodge, the firm name being engraved on each check and the individual signature written underneath. Dodge would then take away the check book and deliver the several checks to Bedell for delivery to the respective payees. Bedell then forged the names of the payees. The New York Court of Appeals held that the checks were order instruments and the depositor was entitled to recover the amount the bank paid as forged indorsements. See statement of court in Appendix C.

In *American Sash & Door Co. vs. Commerce Trust Co.*, *supra*, as shown by the facts in the opinion, the timekeeper followed a scheme very similar to that employed in the instant case by adding names to a payroll and turning same over to a bookkeeper who made out the checks and handed them to the officer of the plaintiff company authorized to sign the checks. The timekeeper added the name of one non-existent person and the names of six former employees to the payroll. After the checks were signed they were returned to the timekeeper for distribution. He kept the checks and forged the names of the payees. The excellent statement of the court holding such checks to be order instruments is set forth in Appendix D. In its well considered opinion the court points out that the guilty knowledge and fraudulent intent of the agent is not imputed to his employer or those authorized to sign the checks.

In *Los Angeles Invest. Co. vs. Home Savings Bank*, *supra*, a similar fraudulent scheme was employed, as shown by the facts stated in the opinion. In that case the manager of the fire insurance department of a company engaged in the real estate business presented to the proper officer who had authority to sign checks requisitions for the payment of claims of fictitious persons, and of real persons to whom the manager had no intention of making any payments. These ostensible

claims against the company did not in fact exist. A check in accordance with the demand was prepared and also presented to the officer authorized to sign checks. The signed checks were then returned to the manager who indorsed them in the name of the payees and converted the money to his own use. The court held that the intention of the manager that the checks be made payable to persons who were not to receive them was not attributable to the company, and therefore the checks, though payable to fictitious persons as to the manager, were not payable to fictitious persons as to the company. Hence, they were order instruments and not payable to bearer and the bank upon which they were drawn was liable to the company, its depositor, because of its payment of the checks on the forged indorsements. In concluding its statement on this question the court said:

“ . . . The intent and knowledge of the principal was, as we have said, that of the officers who drew the checks and they were wholly innocent of any intention of drawing checks to fictitious payees.”

The decision in the case of *Board of Education vs. National Union Bank, supra* (16 N. J. M. 50, 192 A. 352, Aff'd. 121 N. J. L. 177, 1 A. (2d) 383), also treats this question fully and supports plaintiff's contention that these checks were “order” instruments and that the indorsements by Crowe constituted forged indorsements,

making the bank liable to the Interior Warehouse Company for the amount of these checks charged to the latter's account.

Depositor's Duty to Bank

We have discussed above the bank's duty to its depositor, and it may fairly be asked at this time, What is the depositor's duty to the bank arising from the contractual relationship existing between them? The appellee by its answer and the pre-trial order by issues 18, 19, 20 and 21 of Article VII (Tr. 40) have injected into the case the question of the effect of the bank statements and the canceled checks which are returned monthly to the depositor. Included in these returned cancelled checks were those bearing the forged indorsements. On the statement of the bank were the following words:

"Please examine at once. If no error is reported within ten days, the account will be considered correct."

It is the contention of appellants that the issues thus made are not material or relevant to the case and our position is noted in the pre-trial order (Tr. 42).

At the outset we call this Court's attention to the fact that we are dealing with forged indorsements of the *payees*, and not a forgery of the drawer's signature or an alteration or irregularity appearing upon the face

of the checks. The duty of the depositor to examine the returned checks and statements for forgeries, alterations or irregularities on the face of the checks differs from his duty to examine returned checks for forged indorsements and the law recognizes this difference.

The duty of the depositor does not extend to the examination of indorsements on the returned checks, as he is justified in relying on the bank's observing proper precaution to see that payment is made only in accordance with his directions, and he is not bound to know the signatures of the payees or other indorsers.

Los Angeles Inv. Co. vs. Home Sav. Bank of Los Angeles, supra.

Detroit Piston Ring Co. vs. Wayne County, etc. Bank, supra.

American Sash & Door Co. vs. Commerce Trust Co., supra.

In practically every case referred to this Court in this brief involving a scheme similar to that employed by Crowe, the drawee bank in resisting payment has raised a defense based upon its monthly statement and returned checks. They usually assert (1) that an account stated has arisen between the bank and the depositor, and (2) that the depositor's negligence in failing to discover the forged indorsements bars its right to recover.

Such a defense was squarely raised in *National Surety Co. vs. Manhattan Co.*, 252 N. Y. 247, 119 N. E. 372. In that case thirty-nine checks drawn between January, 1921, and June, 1923, were involved and between said dates the bank returned the checks of its depositor monthly together with a statement. At the request of the bank *the depositor each month returned to it a writing acknowledging the receipt of the vouchers and statement and the correctness of the statement.* The New York Court of Appeals in holding that no account stated was created quotes from *Shipman vs. Bank of State, supra*, the following:

“The statement of the account made by the defendant to the plaintiffs, from time to time, the balancing of the bank pass book, and the return of the same to the plaintiffs with the vouchers, including, as they did, the checks in controversy, with the forged indorsements thereon, constitute no obstacle to the maintenance of this action by the plaintiffs, as they were ignorant of the facts and circumstances under which the checks were issued and put in circulation.”

In dealing with the questions of the depositor's negligence, the court first points out in the opinion facts dealing with the manner of the employee's conduct, which facts in themselves show that the forgery could more easily have been discovered from an examination of the checks than in the instant case. The clerk in that case was possessed of no assets, but was indebted to his em-

ployer in the sum of \$26,000.00. No such circumstance was present in the instant case. In placing a forged indorsement of the payee's name upon the back of the first check as well as on all the subsequent checks, he made no attempt to simulate the handwriting of the payee. And on every check forged by him, he placed his own indorsement beneath the forged indorsement. Crowe did not do this, the record showing only seven checks, with long intervals of time between same, that bear his own signature. Also, in the discussed case, the employee deposited every check in his own account in the Bank of America, whereas Crowe did not deposit these checks to an account. The court points out that if an examination of the indorsements on the returned checks had been made, the depositor's suspicions would easily have been aroused because of such facts, and the "story of the forgeries would have been revealed." But in holding that this was not a defense available to the bank, the court stated the law as follows:

"The difficulty is that no duty rested upon the depositor, upon the return of its vouchers by the bank of deposit, to examine the indorsements upon the checks in order to discover whether the signatures indorsed were genuine. *Welch vs. German American Bank*, 73 N. Y. 424, 29 Am. Rep. 175; *Shipman vs. Bank of State*, supra. In *Welch vs. German American Bank*, supra, the decision is correctly expressed in the headnote, as follows: 'A depositor owes no duty to a bank requiring him to examine his pass book or returned checks, with a view to the detection of

forgeries in the indorsements; he has a right to assume that the bank, before paying his checks, will ascertain the genuineness of the indorsements'."

And in *Los Angeles Invest. Co. vs. Home Sav. Bank*, *supra* (180 Cal. 601, 182 P. 293), in discussing this question the court follows the rules laid down in the Shipman case that no account stated is created and also no duty rests on the depositor to examine the indorsements. As to this last the court said:

" . . . But a depositor is not bound to examine the indorsements on returned checks. He is bound within a reasonable time to ascertain the genuineness of the checks themselves (*Janin vs. London & S. F. Bank*, 92 Cal. 14, 14 L.R.A. 320, 27 Am. St. Rep. 82, 27 Pac. 1100); but, as to indorsements, the rule and its reason are correctly stated in *Shipman vs. Bank of State*, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371. ' . . . When it returns the check to the depositor, as evidence of a payment made by his direction, the latter has the right to assume that the bank has ascertained the fact to be that the indorsement is genuine'." (Citing a host of cases.)

In view of the fact that the law on this point is so well settled and has been passed upon in practically every case involving continued forged indorsements by an employee, there is no need to extend this discussion further by citing more cases or discussing the evidence, but we do call this Court's attention particularly to the

well considered opinion in *American Sash & Door Co. vs. Commerce Trust Co.*, *supra*, and *John G. Patton vs. Guaranty Trust Co.*, 238 N. Y. S. 362, 227 A. D. 545, Aff'd. 254 N. Y. 621, 173 N. E. 893. In this latter case the court stated that only three things are required of the depositor: (1) compare the vouchers returned by the bank with the check stubs in his stub book; (2) compare the balance entered in the statement (or pass book) with the balance in his stub book; (3) compare the returned vouchers with the list of checks entered in the statement.

Thus it is obvious that the language "If no error is reported within ten days the account will be considered correct," does not in any way go to relieve the defendant from the duty to ascertain, at its peril, the genuineness of the payee's indorsement or release it from obligations incurred by its failure so to do.

Failure of Depositor to Discover Forgeries

Closely connected with the foregoing charge of negligence of the depositor in the examination of the returned cancelled checks and the bank statements is the charge that the employer-depositor was negligent in failing to discover the forgeries and the cashing of the checks within a reasonable time thereafter. (Paragraph III, Conclusion of Law, Tr. 65.) This defense likewise has

been raised by the banks in practically every one of the cases cited to this Court in this brief.

It is the position and contention of appellants, first, that as a matter of law the Interior Warehouse Company was not negligent, and secondly, that even if it could be considered that the company was negligent, such negligence was not the proximate cause of the loss so as to defeat recovery from the bank. In the language of the courts, as expressed in the cases hereinafter cited and discussed, such failure to discover the fraudulent acts of the employee neither "induced or contributed to the payment of these checks by the banks."

Between October 2nd, 1935, the date of the first check bearing the forged indorsement, and April 21st, 1939, the date of the last check bearing the forged indorsement, Crowe forged the payee's name on 126 checks. The checks are set forth in chronological order as to time in Findings of Fact V and VI (Tr., pp. 46 to 59). This record shows that during this period of 44 months, Crowe did not obtain a great number of checks in any one month. In only two months, December, 1937, and August, 1936, did the number reach six. In six months, September, 1936, and July, September and November of 1938, and February and June of 1938, the number was five. In the remaining months two, three

or four checks were obtained and in many months no checks were obtained.

Yet during this period, according to defendant's exhibit 24 (see stipulation Tr. 99 at p. 100), the "cancelled checks and bank statements delivered by the defendant, the Bank of California, to said Interior Warehouse Company, each month covering the period from January, 1935, to June, 1939, and that *the average number of checks per month was approximately 275.*"

Thus the number of irregular checks as compared with the number of proper checks issued each month was exceedingly small and the amount of these checks as compared with the total amount of all the checks was likewise small.

The manner whereby the amounts of these checks were concealed in the records of the Interior Warehouse Company is set forth in Paragraph IX of the Findings of Fact (Tr. 61):

"During the entire period of the said negotiation and cashing of said checks by said Garth L. Crowe and in order to account for the same on the books and records of said Interior Warehouse Company, he made irregular and improper entries therein by the following methods:

(a) Increasing dock and country payrolls by adding names and amounts thereto.

(b) Recording in the monthly summary sheet a larger amount than the dock payroll actually showed. [60]

(c) Raising amounts properly due employees.

(d) Charging labor, repairs, insurance or other expense accounts without proper support, the contra entries being to accounts payable to which irregular disbursements had been charged.

(e) Making direct entries in the ledger without support in a book of original entry."

Also, during this entire period the Interior Warehouse Company employed Price, Waterhouse and Company, certified public accountants, to audit its books, which audits were made annually (Tr. 137). In making these audits they would test check the payroll records and the checks issued to payroll employees with the payroll accounts and time books. (Tr. 136, 137 and 142 to 148.) But during all of these audits for the years 1935 to 1939 they failed to discover any irregularities in the records of the company which would throw suspicion on Crowe or that irregularities existed in the book-keeping or the issuance of checks. Even with respect to the existence of voided checks (the nineteen originals of which Crowe destroyed after forging the indorsements) the accountants did not find this procedure unusual as the testimony of Mr. Rawlinson shows:

"A. There weren't a large number of checks that were voided. Every company has some checks that were voided. Sometimes it is carelessness on the part of employees; sometimes they destroy them and sometimes they retain them. Some companies retain them and some companies don't.

Q. Weren't there quite a number in this case, Mr. Rawlinson?

A. I wouldn't say that there was an abnormal number. The number of checks voided that way depends quite often on the carelessness or the efficiency of a girl making out payrolls . . ." (Tr. 146.)

* * * * *

"A. There was no particular suspicion aroused by having a check marked void.

Q. No, but the number you did find in here—

A. (Interrupting): I say, in this particular case the number of voided checks in this company never struck me as being out of the way." (Tr. 147.)

As pointed out above in our Statement of the Case, the discovery of the irregularities was made by an accountant of Price, Waterhouse & Co. by accident when he noticed that an address on a cancelled check payable to an employee in eastern Washington was the address of his personal friend (Tr. 109).

In view of these facts how can it be said that Interior Warehouse Company did not discover the negotiation and cashing of said checks by Crowe within a reasonable time? Here is a firm of accountants, specialists in the work of auditing books, who made repeated audits, and yet found no discrepancies in the records, but chanced upon the acts of Crowe by pure accident.

The burden of proving negligence of the depositor is upon the bank, *U. S. Cold Storage Co. v. Central Mfg. Dist. Bank*, *supra*, (343 Ill. 503, 175 N. E. 825)

American Sash & Door Co. v. Commerce Trust Co., *supra*, (332 Mo. 98, 56 S. W. (2d.) 1034). *Los Angeles Invest. Co. v. Home Sav. Bank*, *supra*, (180 Cal. 601, 182 P. 293). The evidence in the case does not tend to prove such negligence but on the contrary shows the skill by which Crowe operated and the difficulty in discovering it.

Furthermore, in this case there is no evidence of any circumstances which would cause a reasonably prudent employer to suspect his bookkeeper or payroll clerk. No evidence was introduced to show that Crowe lived beyond his means, buying expensive clothes or cars, or that he gambled and drank, or borrowed money, etc. facts which would cause an employer to suspect an employee working for a modest salary. The payroll expense of the company did not increase beyond its normal proportion and relationship to the operation of the business, nor did any other item of expense show an abnormal increase so as to cause the company to seek a reason for it. See *Detroit Piston Ring Co. v. Wayne County Home & Sav. Bank*, *supra*, (252 Mich. 163, 233 N.W. 185). The record is devoid of any evidence of negligence on the part of the Interior Warehouse Company in failing to discover forgeries.

Can it be said that Interior Warehouse Company failed to discover these forgeries because it trusted Crowe,

and therefore it was negligent? In *Los Angeles Invest. Co. v. Home Sav. Bank*, *supra*, the court said:

"... Complaint is chiefly made that the company relied upon the honesty of its heads of departments and the regularity on their face of the demands or requisitions which such heads approved, and made no investigation to determine whether such demands were fraudulent or not. But trust must be placed in someone (*Kohn v. Sacramento Electric, Gas & R. Co.*, 168 Cal. 1, 141 Pac. 626; *The Yamato v. Bank of Southern California*, 170 Cal. 351, 149 Pac. 826), and necessarily in heads of departments. If trusting them in regard to demands for checks for disbursements regular upon their face is negligence, so it would be negligence to trust them in a hundred other ways in which it is within their power to defraud their employer. Business could not be conducted on any such basis. It is impossible for any large concern to investigate minutely in advance every demand for disbursement necessary for it to make in its daily business. The delay and expense of so doing would be too great."

The above statement is approved and quoted in full by the Supreme Court of Illinois in *United States C. S. Co. v. Central Mfg. Dist. Bank*, *Supra*.

But even if it could be said that the Interior Warehouse company failed to discover the dishonest acts and forgeries of Crowe within a reasonable time after their occurrence such failure would not relieve the bank from its liability because such failure was not the proximate cause of the payment of the checks by the bank. As stated by the courts in the two cases last cited above:

“But however this may be, even if the company were guilty of negligence in signing the checks upon the fraudulent demands of Emory, it is plain that such negligence did not contribute to or induce the acceptance by the banks of the forged indorsements. The forgery of the indorsements was entirely distinct from the issuance of the checks on false demands, and there was no relation between them.”

The negligence of the drawer of a check is immaterial unless it is such as directly and proximately affects the conduct of the bank in the performance of its duties.

See last cited cases and

Jordan-Marsh Co. v. National Shawmut Bank, supra, (201 Mass. 408, 87 N. E. 740)

Shipman v. Bank of State, supra, (126 N. Y. 318, 27 N. E. 371).

John G. Patton Co. v. Guaranty Trust Co., supra, (238 N. Y. S. 362, 227 A. D. 545 Aff'd 254 N. Y. 621, 173 N. E. 893).

In this last case the Court said:

“The only negligence which the defendant may take advantage of to relieve itself from liability is the omission by the plaintiff to perform some duty which it owed to the bank. The plaintiff owed the bank no duty to keep a proper set of books and records or to keep any books of record whatsoever except a check book and check stubs. Therefore whether the plaintiff had a proper bookkeeping system and kept proper records is immaterial. *Nor was the plaintiff negligent in employing Ham and relying, implicitly upon his honesty and integrity until it had some notice to the contrary.*

A bank that has paid out money upon forged indorsements may relieve itself from liability only by establishing that the *payment was induced* by the depositor's negligence and that in making the payment it was free from any negligence. This is an affirmative defense, and the bank has the burden of proving not only the depositor's negligence *but its own freedom from negligence.*" (Emphasis ours)

In this case, the depositor's failure to discover the dishonest acts of Crowe, if negligence at all, was not the proximate cause of the loss. The proximate cause of the loss was the cashing of the checks by the Meier & Frank Co. and the other business firms without seeking proper identification from the forger Crowe at the time he indorsed and cashed the checks. The bank, as pointed out above, in willingly accepting the acts of the subsequent indorsers and collecting banks as the fulfillment of its duty to its depositor is bound by their negligence and accepted it as the act whereby they breached their contract to the depositor. Regardless of any negligence of the Interior Warehouse Company whereby Crowe was able to fraudulently obtain these checks and forge the payees' names thereon (and we deny there was any such negligence) had those to whom they were presented required proper identification, no loss would have occurred. It was their negligence and in turn the bank's adoption of their acts for the fulfillment of its duty which occasioned the loss and constituted the proximate cause thereof.

II. SUBROGATION

The American Surety Company and Lloyds of London in consideration of premiums paid them by the Interior Warehouse Company respectively issued policies whereby each insured the Interior Warehouse Company against a loss such as occurred in this case. Upon discovery of the forged checks the Interior Warehouse Company, by Exhibits 10 and 11, made proofs of loss, and thereafter the American Surety Company and Lloyds of London paid the Warehouse Company by checks, Plaintiffs Exhibits 12, 13 and 13 A, the total amount of the forged checks. (Stipulation re Exhibits, Tr. 98).

An insurer, upon paying a loss, is subrogated to the insured's right of action against any other person responsible for the loss. This right of the insurer against any such other person arises out of the nature of the contract of insurance as a contract of indemnity. Subrogation, it has been said, is a normal incident of indemnity insurance.

This right of an insurance company to be subrogated to "all the means of redress held by the party indemnified against the party who has occasioned the loss" is the law of Oregon as shown by the Oregon cases, *United States Fidelity Co. v. United States Nat. Bank*, 80 Or. 361, 157 P. 155, and *American Central Insurance Co. v. Weller*, 106 Or. 494, 502, 212 P. 803, cited by Judge Fee in

his opinion (Tr. 78, 79). He quotes the following from the Weller case (Tr. p. 79):

“‘One who has indemnified another in pursuance of his obligation so to do succeeds to, and is entitled to, a cession of all the means of redress held by the party indemnified against the party who has occasioned.’

“4. It is unquestionably the general rule that on payment of a loss, the insurer acquires the right to be subrogated *pro tanto* to any right of action which the insured may have against any third person whose wrongful act or neglect caused the loss * * *

Such being the law, appellants by this appeal seek its application to them as indemnitors.

The following cases are cited as entitling them to recover under the principle of subrogation. These cases involved fact situations similar to the instant case.

Tarrant American Savings Bond Co. v. Smokeless Fuel Co., 733 Ala. 507, 172 So. 603.

National Surety Co. v. President and Directors of Manhattan Co., *supra*.

National Surety Co. v. National City Bank, 172 N. Y. S. 412.

American Surety Co. v. Empire Trust Co., 240 N. Y. S. 413.

Grubnau v. Centennial Natl. Bank, 124 A. 142, 279 Pa. 501.

New Amsterdam Cas. Co. v. Albia State Bank, 214 Ia. 541, 239 N. W. 4.

In some of the above cases the insurance companies obtained assignments, but as pointed out by courts, an assignment does not add to the insurer's rights. In 60 *C. J. p. 749*, it is stated:

“While the creditor may properly make an assignment of his rights and remedies to the surety where the surety is entitled to be subrogated, the completion of the surety's subrogation, and this right to pursue the rights and remedies of the creditor, is not dependent on the willingness of the latter to make an assignment, for in equity the surety's payment causes an assignment by operation of law and no formal assignment or transfer is necessary.”

If insurance companies can recover by taking an assignment from their insurers, they certainly should be allowed to recover under subrogation as it was created by courts of equity to grant the rights to the party subrogated in situations where legal assignments could not in some instances be obtained.

Judge Fee refused to follow the law of the above cases which involved fact situations similar to the instant case, but instead applied the rule of a line of cases involving a different situation, wherein the courts denied sureties the right to recover. It is also submitted that in doing so, the Honorable Trial Court refused to follow the law of Oregon as declared by the Oregon Supreme Court in *United States Fidelity Co. v. United States Nat. Bank, supra*.

Before discussing some of the cases relied upon by the learned trial judge and which authorities appellee will no doubt use in its brief, appellants call to this Court's attention the following facts which clearly distinguish the instant case from these others. Crowe was not a governmental official required by statute to post a bond insuring for the benefit of *any* person who may suffer a loss because of the dishonesty of the public official in handling public funds or in administering his office. The "bonds" or policies in the instant case were in truth, and in fact, insurance policies obtained and paid by the Interior Warehouse Company insuring it *and no one else*, for the loss covered by the said policies.

Crowe did not obtain these policies and the insurance companies were not guaranteeing his honesty to the world. These policies insured the Interior Warehouse Company, the named insured, against certain designated risks—"such pecuniary loss as the employer shall have sustained of money * * *" resulting from the acts specified. (Tr. 179, 180). Crowe was not the insured, his employer was. He was merely one of many employees and *his employer could* "add new or additional employees other than those appearing on the schedule" and they were to be "automatically added to the schedule beginning with the date" of their employment. (Tr. 182).

The Interior Warehouse Company was a depositor

in the defendant's bank, and the checks in question were *drawn* upon the defendant. A definite contract relationship existed between them arising from said relationship and, as pointed out above, under said contract relationship, the defendant owed to its depositor certain well recognized duties. One of these duties arising from this relationship existing between a bank and its depositor is that the bank can only pay out funds in accordance with the order of the depositor and the bank must, at its own peril, determine the genuineness of the payee's indorsement. This duty is absolute and any payment in violation of it is wrongful.

As this Court will discover in its examination of the cases some confusion exists in the decisions of the courts. Statements of law and application of well grounded principles properly applied in a given case to the facts of the case are carried over and wrongly applied in other cases involving a different factual situation.

The following cases:

American Bonding Co. v. State Sav. Bank, 47 Mont. 332, 133 P. 367.

National Surety Co. v. Arosin, (C.C.A. 8th) 198 F. 605.

American Bond Co. v. Welts, (C.C.A. 9th) 193 F. 978.

American Surety Co. v. Citizen's Nat. Bank, (C.C.A. 8th) 294 F. 609.

American Surety Co. v. Lewis State Bank, (C.C.A. 5th) 58 F. (2d) 559.

Stewart v. Commonwealth, 104 Ky. 489, 47 S. W. 332.

and many others, all deal with a public official who by statute or other requirements as an incident to his public employment, is required to obtain a bond covering his handling of official funds. The bond in such case is obtained by the official and covers the faithful performance of the acts of said official in his official capacity as a public officer. This duty he owes to the entire commonwealth—all its inhabitants—and the bond consequently inures to the benefit of all, the bank with which he deals as well as the sovereign State, or other Governmental agency. Cases such as this—involving such bonds—are in a class by themselves and most courts recognize this distinction.

The decisions of the courts in refusing recovery to sureties in the public official cases are based on two grounds. First, the bond (and usually by express provision of the bond itself or the statute requiring it, See *American Bonding Co. v. Welts*, *supra*, at p. 980) is for the faithful performance of the officials' duties and is for the benefit and protection not only of the Governmental

division but all others who might be injured by a violation of the official's duties. The bank as a depository of the public funds or as one who deals with the official is itself an obligee of the bond. In such cases *the bank itself upon reimbursing its depositor or the Governmental division could recover directly from the surety.*

The case of *American Surety Co. of N. Y. v. Robinson*, (C.C.A. 5th) 53 F. (2d) 22, clearly points this out as the basis of the rule of law applicable to sureties on bonds of public officials, stating, page 23:

“... the surety may often be subrogated to the independent rights of action of the creditor against third persons. But this can never happen when such third party, if held liable in the first instance, would have had recourse over on the principal and his surety.”

The court also cites and quotes from *American Bonding Co. v. Welts, supra*, as to which no additional comment is necessary to show the reasoning of this line of cases which is clearly inapplicable to the facts and situation in the instant case.

The second ground, closely associated, and which follows from the fact that the *official* is the principal on the bond, is that the loss should fall on the surety whose *principal* was dishonest. And in doing so the courts have made the statement which has been repeated, (improperly

in cases involving entirely different fact situations) that since the bank did not *actively* participate in the fraud nor was it guilty of "culpable negligence", the surety could not recover.

In the instant case, we are not asking this Court to reject the rule of these cases. We say that rule does not apply and especially it should not be applied to the facts in this case in view of the Oregon case of *U. S. F. & G. v. United States Nat. Bank, supra*, (80 Or. 361, 157 P. 155).

Crowe was not a public official obtaining a bond covering the faithful performance of his duties. The appellee bank was not a beneficiary of this policy. We do not have a bond naming Crowe as the principal but a policy of insurance in which the Interior Warehouse Company is the named insured. *Only this company*—the named insured—*could ask the insurers to pay*. The bank is neither an obligee or a beneficiary.

The excellent decision of the Circuit Court of Appeals, Eighth Circuit, in *Martin, et al v. Federal Surety Co.*, (C.C.A. 8th) 58 F. (2d) 79, shows the confusion in the decisions of the courts from the careless use of language and a failure to clearly apply the principles of subrogation. Its opinion is of special importance because it decided the case of *National Surety Co. v. Arosin*, 198 F. 605, a leading case in which a surety was denied recovery

on the ground that the bank was not negligent. (This case has since been indiscriminately cited that in order for a surety to recover from a third party it must be shown that such party was guilty of fraud or culpable negligence.) But that case did not deal with the violation of a drawee bank's duty to its depositor to pay only upon the order of the drawer.

The Martin case makes it clear that a surety may recover from a third party whose *negligence* caused the loss and clarifies the confusion, stating:

“There is, in our judgment, no substantial basis in any of the cases in this circuit for the doctrine that in order to have the right of subrogation as against a third party, there must have been ‘culpable negligence’ on its part. The doctrine grew from the use by the court in *National Surety Co. v. State Savings Bank* of the term ‘morally culpable’, illustrating that while in nature ‘tall oaks from little acorns grow,’ in law erroneous doctrines from small phrases develop. It is fairly settled in this circuit by the decisions we have referred to that where subrogation is sought by a surety to the rights of the original creditor as against third parties, there must have been either participation in the original wrongful act or negligence on the part of the third party sought to be charged. *But it is not necessary that such negligence be culpable or gross.*” (Emphasis ours)

It may be true in the instant case that the defendant was not guilty of “culpable negligence”, whatever that term may mean, but it cannot be denied that it violated

its positive duty—a duty more stringent than the duty of reasonable care—the test of negligence. The bank in this case is not an innocent third party, but as already pointed out, was duty-bound to its depositor to determine the genuineness of the indorsements.

The case of *American Surety Co. v. Citizen's Natl. Bank*, *supra*, cited by the learned trial judge as an authority for denying subrogation in the instant case recognizes in its opinion the distinctions we have pointed out. That case involved a bond of a public official, but the bank in the case was not a drawee bank as is the appellee in the instant case. Note the statement of the court on page 611, after the citation of the numerous cases, where it makes a distinction between the facts before it and the facts of the cases cited dealing with the absolute duty of a bank to its depositor:

“As between it and its depositor it is burdened with the duty of not paying forged checks, or genuine checks with forged indorsements. If it pays such checks, as between it and its depositor it must stand the loss, and cannot debit the depositors' account with the amount so paid.”

The court did not have a case dealing with such facts, whereas such facts are present in the instant case.

Furthermore in the above case, *Davisson*, the official, was authorized to draw county funds from the bank. He

obtained *two cashiers checks* and *two drafts* and made them payable to fictitious persons to whom the county was not indebted. These instruments in fact were "bearer" instruments. There was no breach of any contract duty owing to the county. As the court said, page 613:

"But as the county was neither drawer, payee or indorser on either cashier's checks or drafts it sustained no relation to them that put appellee under a duty to it in the respects charged; and where a defendant is under no duty, contractual or otherwise, to the plaintiff there is no cause of action for the former's negligence."

Thus in that case, even by subrogating the surety to the county's rights, no right of recovery existed. In the instant case, Interior Warehouse Company was a drawer and the bank did breach its contractual duty. The opinion therefore is not a holding for a denial of subrogation to appellants but contains a definite recognition of such right.

The learned trial judge in his opinion (Tr. 80, 85) cited *Meyers v. Bank of America*, 11 Cal. (2d) 92, 77 P. (2d) 1084, which case appellee will no doubt cite and rely upon. This was an action in the name of the plaintiff for the benefit of the United States Guaranty Company which had issued a bond indemnifying plaintiff from the wrongful acts of plaintiff's office manager. The said

manager in the course of conduct of plaintiff's business received checks payable to plaintiff, forged plaintiff's name thereon, and cashed them with one Wascher who paid full value therefor. The manager converted said sums to his own use. Wascher deposited the checks in his account with the defendant bank and the latter presented them to the respective drawees and received full payment. The Guaranty Company paid the plaintiff in full the amount of the checks so converted by the manager and the plaintiff assigned any cause of action it might have against the bank, together with the right to maintain an action at law in the name of the plaintiff.

The facts thus disclose an entirely different situation from that in the instant case. Meyers was not a depositor in defendant's bank. The relationship existing between a bank and its depositor above referred to did not exist, nor did the peculiar incidents relating to such relationship. There was no privity of contract—a contract imposing certain necessary requirements upon the bank, essential and peculiar to such relationship and in addition to the normal legal rules and principles arising from the mere transferring and negotiation of commercial paper between the general public. The action in the instant case is against the *drawee* of the checks and not against Meier & Frank Co., Inc. or the United States National Bank, or the First National Bank, collecting banks, none of which

had contracted with the Interior Warehouse Company to act as a depository and a drawee upon whom checks should be drawn. It is an action for the breach of a contract—the violation of a specific duty imposed by said contract—and not for damages for mere negligence. This factual situation cannot be lost sight of in considering this case because, as stated in dealing with the application of the doctrine of subrogation, each case must be determined in the light of the circumstances therein found.

At the outset of its opinion, the court in the *Meyers* case, (92 P. at page 1085), recognizes authorities holding contrary to the result it desires to reach. It then proceeds to discuss all the cases cited by the learned judge and relied upon by appellee in the trial court, but not one of these cases involved a situation similar to that involved in the instant case, although some of them were somewhat similar to the *Meyers* case. The results reached in those cases are based upon consideration of factors which are not present in this case, and even then it is admitted by the court that the authorities are divided. In reaching its conclusion, the court says that the bank was innocent third party.

Such, however, is not the fact in the instant case because here the bank was not a third party, but a party in direct privity and contractual relationship with its

depositor and was not innocent but guilty of a breach of its *positive* duty, whether it did so carelessly, knowingly, or otherwise. Liability is not based upon mere negligence but upon breach of this positive duty. In truth and in fact the defendant bank did not—and the evidence showed the custom of the banks—inquire or seek authentication of the genuineness of the payee's endorsement in compliance with its duty, but was satisfied to rely upon the conduct and guaranty of the indorsers subsequent to the payee to perform this duty. It may well be said that it delegated this duty—an absolute and positive duty imposed upon it and owing to its depositor—to said indorsers and hence the negligence of such persons in failing to authenticate the payee's indorsement is imputed to it. Or, without resorting to legal fiction, it saw fit to omit performing this duty and to rely solely upon the absolute guaranty of the indorsements of the collecting banks.

In addition to the cases heretofore cited in this portion of our argument as supporting appellant's right to recover under the principle of subrogation, we cite the following cases:

Fidelity & Deposit Co. v. Oklahoma State Bank, 77 F. (2d) 734. (C.C.A. 10th) (The opinion is written by Circuit Judge Lewis, who wrote the opinion in *American Surety Co. v. Citizen's National Bank*, *supra*.) The plaintiff in that case as the insurers in the instant

case agreed to indemnify the employee's employers for defalcations. The bank was not guilty of any "culpable" negligence nor was it a drawee which breached its positive duty, but was merely negligent.

National Surety Co. v. Bankers Trust Co., 210 Ia. 323, 228 N. W. 635.

Metropolitan Casualty Ins. Co. v. First Nat'l Bank of Detroit, 261 Mich. 450, 246 N. W. 178.

Fidelity & Deposit Co. of Md. v. Fort Worth Natl. Bank (Com. of Appeals, Tex.) 65 S. W. (2d) 276.

Rivers vs. Liberty Natl. Bank, 135 S. C. 107, 133 S. E. 210.

Maryland Casualty Co. v. Chase Natl. Bank, 153 Misc. 538, 275 N. Y. S. 311.

First & Tri-State Nat. B. & T. Co. vs. Mass. Bonding & Ins. Co., 102 Ind. A. 361, 200 N. E. 449.

This last case is of special interest because it involved an action by the insurance company for the drawee bank against a collecting bank. In view of the contention of the "equities" of the parties, this case suggests a clear answer. The appellants have made the payment and therefore suffered a loss which they seek to recover from the appellee, Bank of California. The bank's contention of "equities" conveys the idea that if it pays this loss, which under the law it should, it will suffer the loss, and

since it was not an active participant in the fraud and received no benefit from the transactions (which view is erroneous in itself, because as a bank it does receive a benefit from the handling of its depositors' funds) the "equities" are with it as against the appellants who received premium payments. The fact of the matter is that the appellee in this case will not sustain any loss, because it can recover from those to whom the checks were presented by the forger, or from the First National Bank of Portland and the United States National Bank, the amount of these checks, because the checks came to the appellee through these banks, and others who guaranteed the indorsements. The defendant, or its surety, can do what the plaintiff in the above case, *First Tri-State Nat. B. & T. Co. vs. Mass. Bonding & Ins. Co.*, *supra*, did. Hence, "equities" are not in favor of the appellee. Following this procedure of recovery over, which exists under recognized legal principles of law, and which under the Rules of Civil Procedure could and should have been followed in the instant case, the loss will be placed upon the parties who dealt with the forger, and who were careless and negligent in securing proper identification of the named payees, and thus are devoid of these so-called "equities."

To deny the appellants the right of subrogation in this case would be going backwards in the law. The learned trial court in his opinion (Tr. 89), recognized

that Interior Warehouse Company could recover from the bank, but denied appellants this right under subrogation. In *Grubnau vs. Centennial Natl. Bank, supra*, in which a recovery was allowed to the insurance company, the inconsistency of such a stand is pointed out when the court states that the insurance company need not compel the insured to first sue the bank and pay the insured only if the latter suffers a loss by failing to collect from the bank. But the result of the decision in the instant case will lead to this.

How inconsistent such procedure is with the spirit of the attempted judicial reforms as exemplified by the new Rules of Civil Procedure. The movement has begun to expedite the settlement of controversies, to eliminate repeated litigation and to speed up the processes of the courts to the business tempo of the country. And yet the result of this case is a direct step in the opposite direction. The learned trial judge remarked that the case should be viewed realistically (Tr. 89, 347). So should the result of his decision. If this decision is allowed to stand as the law in this type of case, it is apparent what insurance companies will do. Instead of writing policies such as they did in this case and paying the loss upon its discovery and demand by the insured, the policies will be so written that the insured must first seek recovery from the bank and only after the assured

litigates (or by subterfuge or terms of the policy the insurance companies will handle such litigation for the assured) will payments be made. Such is not progress in the law, and in practice should not be encouraged by judicial decisions.

As long as the insured could recover there is no reason to deny subrogation to the insurance company. All the defenses which the bank has against its depositor can and has been asserted against the insurance companies and the doing of equity does not require more.

Closely connected with the above observations of the realities is the consideration of the fact that in writing insurance policies, insurance companies do bear in mind the value of subrogation as an incident to the policies. Attention need only be called to the numerous cases in the reports dealing with subrogated claims by insurance companies. Without this right, premiums would of necessity be much higher and certain policies would in fact not be written. This fact is likewise recognized in that excellent opinion in *Martin et al vs. Federal Surety Co.*, *supra* (58 F. (2d) 79) at p. 90:

“While the record does not show anything as to rates being made in consideration of the right of subrogation, it is reasonable to believe that the fact of subrogation would affect the rates paid for the indemnity. Appellee paid the liability immediately, and it seems to us the equities of this situation are with appellee.”

As a final citation of authority for the right of plaintiffs to be subrogated to the cause of action which the depositor had against the appellee, plaintiffs cite the Oregon case of *U. S. Fidelity Co. vs. United States Nat. Bank*, 80 Or. 361, 157 P. 155. Under the authority of this case, there is no question of the surety's right to recover by subrogation. In that case the insured, or principal in the bond, was himself guilty of wrong and yet the Oregon Supreme Court permitted the surety to recover under the principle of subrogation, because it paid an obligee. (Appellants' assured in the instant case did not commit a wrong and appellants paid their assured.) The bank was not guilty of "culpable" negligence but breached its agreement as a depository and the court said, page 368:

"The bank by its wrongful act (breach of its contract) in paying out the funds on the private checks of another, made it possible for the other to squander the money of the wards, and thus became in effect a joint tort-feasor liable for the defalcation."

The same is true of the instant case and the rule of the Oregon Supreme Court should be applied. In doing so, we are not asking this Court to do violence to any of the established principles of law, but rather seek their application.

OPINION OF TRIAL COURT

The trial court's opinion is set forth in the Transcript of Record beginning at page 67. The argument heretofore made shows that the trial judge arrived at his decision by an erroneous application of the law to the facts in the instant case. However, we wish here to briefly point out the reasoning of the trial judge as disclosed in his opinion and thus show wherein he erred.

In his opinion (Tr. 77) he recognizes that courts of many jurisdictions, which are entitled to the highest respect have permitted an insurance company to recover from a bank in cases similar to the instant case. He further states (Tr. 77) that:

“ . . . The controlling factors in these decisions are, usually, the rule that the bank is absolutely liable wherever it pays out money on a forged endorsement of the payee, and, secondly, the alleged principle that a surety is entitled to all the remedies which ‘the creditor would have against all persons liable for the debt’.”

This, we submit again, is the law and appellants are entitled to have it applied to them.

The Honorable Trial Court then states (Tr. 78):

“These decisions neglect consideration of the fact that the forger is the only wrongdoer in the situation. Likewise, they neglect consideration of the highly equitable nature of subrogation.”

We submit that this is an erroneous conclusion of the facts and law and it therefore is an erroneous premise on which to decide the case. Coupled with said erroneous conclusion is the trial judge's statement and view which he repeatedly expresses throughout his opinion that the bank was not guilty of negligence, that it was not a wrongdoer and that it was an innocent party (Tr. 77, 88, 89). The trial court is also in error when he states that (Tr. 86):

“ . . . The dishonesty of Crowe was the sole cause of the loss sustained by anyone. If it had not been for that factor, no loss would have occurred.”

The Oregon case of *United States Fidelity Co. vs. United States Nat. Bank*, *supra* (80 Or.361, 157 P.155), discussed and quoted from by the trial judge in his opinion (Tr. 78) shows that his views as above set forth are erroneous and also that he did not follow the law of Oregon as declared by the Supreme Court of the state, which law the Federal courts must follow.

In that case the *principal* on the bond was dishonest and committed fraud. The surety in that case *did* make itself primarily responsible for its principal's defalcations and it did not pay an *assured* but an obligee. The bank committed no “wrongful” act other than a breach of its contract with its depositor—the same implied contract arising from its acceptance of its depositor's funds as involved in the instant case.

In permitting the surety to recover from the bank by being subrogated to the estate to which it paid the amount of its principal's defalcations, the Oregon Supreme Court made the statement set forth in the trial court's opinion (Tr. 78).

That statement applies with full force to the instant case. What does the Oregon court mean by "its wrongful act"? Nowhere in its opinion does the Oregon court indicate that it is speaking of a "wilful act," a "fraudulent act," an act whereby the bank "knowingly abetted" the dishonest guardian, or of being guilty of "culpable" negligence. The only wrongful act with which the Oregon court is dealing is the act of the bank in breaching its agreement. Yet such an act it states is "wrongful"; that it made it possible for the guardian to squander the money of the ward and that thereby the bank became in effect a joint tort-feasor.

The Oregon court did not view the dishonest act of the guardian as the "sole cause" of the loss, nor did it view the dishonest guardian, the principal on the bond, as the "sole wrongdoer," and that "if it had not been for that factor, no loss would have occurred" (Op. Tr. 87).

Of course a payment of a check bearing a forged indorsement cannot occur without the initial dishonest act of the forger. But such act of the forger is not the

sole cause of the loss. *The loss can only occur by payment by the bank on which it is drawn*, by breach of its duty by paying same or in its willingness to accept the guaranty of subsequent indorsers as a fulfillment of its obligation to pay checks only on the order of the drawer. The act of the bank or the person to whom the check is first presented and cashed is the proximate cause and that person's negligence in not securing proper identification from the forger must be viewed as being transmitted to the bank by reason of the bank's reliance on the subsequent indorsements. A forger can forge payee's names to checks all day long and his act in doing so without payment by the bank will not result in a loss.

The Oregon case of *American Central Insurance Co. vs. Weller*, 106 Or. 494, 212 P. 803, in no way altered or weakened the rule laid down in *United States Fidelity Co. vs. United States Nat. Bank. supra* (80 Or. 361, 157 P. 155). It reaffirmed the law of that case, and the law we claim is applicable, in its statement quoted by the learned trial judge in his opinion (Tr., p. 79), and as indicated by the emphasis supplied. The appellants in the instant case seek to be subrogated to the right of action which their insured had against the bank "whose wrongful act or neglect caused the loss."

In the *Weller* case, the defendant *Weller* himself,

obtained the policy of insurance and paid the premium. He assigned the contract of sale covering the automobile to the bank. Had he not assigned the contract the loss would have been paid directly to him under the policy. He himself was in the position of an insured. Furthermore, as stated by the court:

“ . . . Weller was in no way responsible for the loss or conversion of the car. He is not accused of any wrongful act.”

The facts of the case are so different that a mere reading of the opinion makes it clear that the Oregon court was not limiting the rule of *United States Fidelity Co. vs. United States Nat. Bank, supra*. The Oregon court cites and discusses in its opinion the case of *Chicago, etc. R. Co. vs. Pullman*, 139 U. S. 79, 11 S. C. 490, 35 L. Ed. 97. The law of this case, which the Oregon Supreme Court recognizes in the Weller case as being correct, is applicable to the instant case. We call this Court's attention to the quotation, in the opinion, from that case. The liability of the appellee bank to the Interior Warehouse Company by reason of their contract relationship is similar to the liability of the railroad company to the Pullman company discussed by the court.

In view of these Oregon decisions, we submit that the trial judge failed to follow the Oregon law as declared by the Oregon Supreme Court.

In view of the facts of the instant case and the law which grants to the insurance companies by subrogation the rights of the insured as against third persons liable to the insured, recognized as the law of Oregon as declared in the above mentioned Oregon cases, the remainder of the trial court's opinion dealing with election of remedies and the primary obligation of the insurers is erroneous and has no application to the instant case.

If the acceptance by an insured of payment of a loss payable to it by an insurance company constituted an election of remedies then there never could be a case whereby an insurance company was subrogated to the rights of its insured. The very case of *Chicago, etc. R. Co. vs. Pullman, supra*, discussed by the Oregon Supreme Court in the Weller case is a direct refutation of an election of remedies in this case. As stated in that opinion (see quotation in the Weller case):

"The collection of the insurance money did not . . . impair the right of the (Pullman) Company to recover the amount of the loss according to the contract with the railroad company. Upon payment of the loss, or to the extent of any payment by them on account of the loss, the insurance companies were subrogated to the rights of the insured and could in its name, or in their joint names, maintain an action against the railroad company for indemnity, if the latter was liable to the insured for the loss of the cars;"

(It is also significant in the above case that this right of recovery over is not made dependent upon "fraud," "culpable negligence" or "wrongdoing" in any sense other than legal wrong which includes "breach of contract." The liability of the railroad company which was required to pay the insurance company was based upon its contract with the Pullman Company.)

An election of remedies does occur when the insured, or its insurance company subrogated to it, prior to its action against a given party has pursued its right of recovery against another also responsible to it. Such a case is *National Surety Co. vs. Perth Amboy Trust Co.* (C.C.A. 5), 76 F. (2d) 87.

The above observations also show the erroneous view of the trial court in its statement (Tr. 87):

" . . . One should not be entitled to recover from another that which he has paid out in discharging a debt in the performance of his own obligation."

Such statement when applied to a payment by an insurance company under its contract of insurance ignores the whole principle of subrogation concededly granted to an insurance company, because in every case its payment is made pursuant to an obligation. In fact, unless its payment is made pursuant to an obligation it cannot

be subrogated, because it would be a mere volunteer and as such not entitled to subrogation.

This erroneous view of the trial court likewise persists in the statement that "Interior is not entitled to more than one recovery." Interior in no way obtains another recovery. Such argument if permitted would not only deny subrogation, but would entirely eliminate it as a principle of our law, because the very nature and meaning of subrogation is that the person subrogated *recovers under the right of the subrogee who has already been paid*. And furthermore, the law does not permit the subrogee to retain the recovery, even if he himself brings the action in his own name.

Comment is also felt necessary on the remarks of the trial judge (Tr. 88) that "If recovery is permitted against the bank the situation will be prolific of litigation." He then recognizes that appellee can sue the collecting banks and these can sue other primary indorsers subsequent to the forged indorsement. Is this judicial reasoning justifying a denial of subrogation? Prolific litigation cannot be an excuse and in fact is or was not necessary. Again we call this court's attention to the new Federal Rules of Civil Procedure, Rule 14 (a), under which appellee could and should have brought in these persons who were liable to it under

their indorsements. (See collection of authorities in recent case, *John N. Price & Sons vs. Md. Casualty Co.*, 2 F.R.D. 409, 410.) We also call this court's attention to the fact that this was called to the trial court's attention at the trial (Tr., pp. 344-347). Any reason for prolific litigation, and the failure of these indorsers to have been brought in is due to the failure of appellee to implead them. In view of this appellants should not be prejudiced and denied the right of subrogation. They are not at fault.

At this point in his opinion and in other places the learned trial judge remarks that it is more reasonable to allow the loss to remain upon the insurance companies who receive a premium for their obligation. We shall not present arguments on this question as to whether it is more reasonable to have the loss fall upon the insurance company and deny it the right to be subrogated to the rights of the insured. The law as declared by the courts throughout the country, including the Oregon Supreme Court, is that the third party responsible and legally liable gets no benefit from the insurance purchased by another. Until the law is changed insurance companies can by reason of subrogation recover from third persons liable to the insured. Appellants are entitled to the law as it now exists and as it has been declared by the Oregon Supreme Court and under said

law appellants are entitled to a judgment against appellee. The judgment of the trial court is erroneous and it is respectfully submitted that it should be reversed and judgment should be entered for appellants.

Respectfully submitted,

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APPENDIX "A"

The principles governing the bank's liability is excellently and clearly discussed in several leading cases cited in our brief dealing with transactions almost identical with those in the instant case. The opinions, however, are long and the cases should be read in full, rather than digests therefrom. However, a clear and complete statement of these principles of law is to be found in Zollman, Banks & Banking, Vol. 6, sections 4231, 4232, 4233. This authority is perhaps the best on the subject, and the text is very ably annotated. The following is that author's statement of the law:

"Sec. 4231. Drawee Bank's Duty to Drawer to Determine Whether Payee's Signature Is Genuine or Authorized.

"The drawee bank at its peril must identify the payee of an order instrument (2). * * *

"A check or draft properly (7) drawn to order is not payable at all until properly indorsed by the payee or his duly authorized agent (8).

"The drawer has a right to insist that the drawee pay his checks only on his order (9).

"The drawer does not owe the duty to the drawee so to prepare its checks that they cannot be successfully tampered with or to employ only honest clerks (10).

"The drawee bank, though it is not chargeable with knowledge of the genuineness of the signatures of the indorsers in the sense in which it must know the signature of the drawer (11), owes the depositor

the absolute duty to pay it only as directed (12) to the person or persons designated by the drawer (13), and, in the absence of estoppel (14) or negligence (15), which is the proximate cause of the loss (16), and which must be proved by the bank (17). * * *

“Its action is not payment so far as the depositor is concerned (23). The impossibility of detecting the forgery is a risk assumed by it (24). It has no right to charge his account with the check so paid (25), and must bear the loss (26).

“Where the only authority given by the customer to the bank is to pay the check on the order of the payee, it is bound to ascertain the genuineness of such payee’s signature (28), whether payment is made through the clearing house or over the counter (29).

“The customer, by drawing the check, imposes this duty on the bank (30), and even negligence on his part is unknowingly making it payable to a fictitious or non-existing person (31) or in delivering it to a person other than the payee (32), or to the wrong employee (33), * * * or in failing to keep books (37), or in failing to keep its books in the most painstaking manner (38), or in failing to discover the forged indorsement (39), is no defense.

“The fact that the drawer has tossed the check at a spittoon without destroying it before executing a duplicate (40), or has made checks payable to its members on forged applications for withdrawals, the means of verifying the signature of such members being at hand (41), has therefore been held to be immaterial.

“In paying checks to any other person than the one to whom they are made payable, the bank therefore acts at its peril (42). It is bound to ascertain the genuineness of the endorsement (43) and, where the payee or endorsee is unknown to it, may require him to identify himself (44).

“The fact that it pays the instrument on the guaranty of another bank does not affect its duty toward its depositor (45). It may not assume that its customer has authority to endorse the payee’s name to the check (46).

“The genuine endorsement of the bank from which the drawee has received the check is no defense as against the drawer (49).

“The customer, in the absence of actual knowledge, may assume, when the check is returned to him as a cancelled voucher, that the bank has performed its duty (50). He is not required to know the signature of payees on returned vouchers (51). He need not, in the absence of suspicious circumstances, search through the cancelled checks for forged indorsements (53).

“His receipt of and acquiescence in the cancelled check does not guarantee the endorsement on it and does nothing more than recognize the direction to the drawee to pay to the order of *the payee* (54).

“The payment by the bank of the check is an assurance to him that the bank has assured itself of the genuineness of the preceding indorsements (55). He is certainly not as much bound as is the drawee to know that the first of several indorsements is forged (56).

“Even if he has the means to verify the signature of the payee, such verification is an act in excess of the duty which he owes to the bank (57). * * *

“Sec. 4232. Bank Paying Check on Forged Indorsement Pays Its Own Funds.

“A payment on a forged indorsement is not a payment in accordance with the drawer’s directions (60). The drawee bank therefore pays the check at its peril (61).

“If the indorsement is genuine, it is a payment

out of the depositor's funds. If it is forged, it is a payment out of the bank's own funds (62), which the bank is not justified in charging against the account of the drawer (63), in the absence of some element of estoppel (64). * * *

"Evidence, therefore, of payment by the bank on a forged indorsement establishes the liability of the drawee toward the drawer (74).

"The fact that fraud is practiced in obtaining from the drawer a genuine check in favor of a third person does not relieve the drawee bank from liability for paying such check on a forged indorsement (75).

"Sec. 4233. Drawer's Liability to Drawee for His Agent's Forgery of Payee's Indorsement.

"The mere fact that an agent of the drawer forges the payee's signature does not improve the position of the drawee bank. The drawer is not bound by such payment where the indorsement is a forgery (76).

"A depositor need not personally handle his checks, but may employ subordinates and rely implicitly on their honesty and integrity, and it is not responsible for their act in forging indorsements of the names of the payees on checks drawn by him (77). * * *

"The hazard of ascertaining the authority of the person who asserts the right to indorse a check is imposed on the drawee, in the absence of estoppel of the drawer (81).

"To be estopped by the act of the agent, the drawer must have had sufficient knowledge of his unfaithfulness (82).

"The mere fact that he has drawn the check on the agent's fraudulent statement that he (the drawer) is indebted to the payee will not be sufficient to operate as an estoppel (83). That he has sent the check to his fraudulent agent is not proof of negligence (84).

APPENDIX "B"

Quotation from 9 C.J.S. at p. 740, cited in Brief, p. —:

"Where a check is knowingly drawn to the order of a fictitious or non-existing person, it is payable to bearer, as is shown in the title Bills and Notes, Section 192, 8 C. J., p. 339, note 20. The bank is under no duty to ascertain the genuineness of the indorsement of the payee (26), and thi is true, also, where such a check is drawn by an authorized agent (27).

"The fictitiousness, in this respect, however, does not depend on the identification of the name of the payee with some existent person, but on the intention underlying the act of the maker in inserting the name (28). Accordingly, if the drawer is not aware that the payee is a fictitious or non-existing person, the previously considered rule, requiring the bank to determine the genuineness of the indorsement at its peril, applies to the indorsement of such a check (29), irrespective of the provision of the Negotiable Instruments Law to the effect that the drawer admits the existence of the payee and his then capacity to indorse (30). *So, if the drawer is induced by the fraud of a third person, or by that of his own agent, to draw a check to a fictitious person, believing in good faith that such payee is a real person, the bank will not discharge any of its indebtedness to the drawer by paying such a check on a forged indorsement (31), and will render itself liable to the drawer for charging his account therewith (32), unless the payment was made on the basis of the drawer's representations (33), or was made to the person actually intended by the drawer (34). Conversely, the bank cannot recover of the drawer for the payment of such a check although forged by the drawer's agent (35). The drawer's negligence in such situation is immaterial, unless it directly and proximately affects the conduct of the bank in paying the check (36).*" (Emphasis ours.)

APPENDIX "C"

Quotation from case of *Shipman et al vs. Bank of State of New York*, 126 N. Y. 318, 27 N. E. 371, referred to in Brief, p. —:

"It is claimed by the defendant that the checks made payable to the order of persons having no existence were, in legal effect, payable to the bearer. It is provided by statute that paper made payable to the order of a fictitious person, and negotiated by the maker, has the same validity, 'as against the maker and all persons having knowledge of the facts, as if payable to bearer'. 1 Rev. St., p. 768, No. 5. We are of the opinion, upon examination of the authorities cited by counsel on both sides, that this rule applies only to paper put into circulation by the maker with knowledge that the name of the payee does not represent a real person. The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer, unless the maker knows the payee to be fictitious, and actually intends to make the paper payable to a fictitious person. *Bank vs. Alley*, 79 N. Y. 536; *Turnbull vs. Bowyer*, 40 N. Y. 456; *Vagliano vs. Bank of England*, 22 Q. B. Div. 103, on appeal, 23 Q. B. Div. 243; *Armstrong vs. Bank*, 22 N. E. Rep. 866 (Sup. Ct. Ohio, Oct. 1889); *Gibson vs. Minet*, I. H. Bl. 569. The findings of the referee that the plaintiffs in good faith believed that the names of the payees represented real persons, entitled to receive from them the amount of the check in each case, having been led to believe this by the fraudulent contrivances of Bedell, and that they intended that Bedell should deliver the check to a real payee therein named, and that they did not intend that they should go into circulation or be paid by defendant otherwise than through a delivery to and indorsement by the payee named, and that plaintiffs

the payee, or to put the checks into circulation, and that no one in fact relied on any appearance of authority, derived from the plaintiffs, in Bedell to indorse the payee's name upon the checks, or to put them in circulation, disposes of this question. The indorsement of the names of the fictitious payees upon the checks in circulation, constituted the crime of forgery, by means of which, and without any fault of the plaintiffs, payment was obtained thereon. The defendant does not occupy any different position with reference to the checks payable to fictitious payees than it does with reference to those payable to real parties whose indorsements were forged. Bedell of course knew that the payees were fictitious, but he was not acting within the scope of his employment, but in carrying out a scheme of fraud upon the plaintiffs, and under such circumstances his knowledge cannot be imputed to his principals. *Frank vs. Bank, supra; Weisser vs. Denison, supra; Welsh vs. Bank, supra; Cave vs. Cave, 15 Ch. Div. 643, 644.*"

APPENDIX "D"

Quotation from case of *American Sash & Door Company vs. Commerce Trust Co.*, 332 Mo. 98, 56 S. W. (2d) 1034, referred to in Brief, p. —:

"The second defense urged by the trust company is that the fifty checks were in law payable to bearer because they were made out to fictitious payees, that is to say, to one non-existent person and six former employees who were not entitled to them or intended by Tschupp to receive them. For this reason it is contended the defendant bank had a right to cash the checks regardless of the indorsements, and is therefore not liable. This is the point on which we think the trial court decided the case." * * * "When, however, the agent or employee has no such authority

and does not execute the checks, but merely fraudulently induces his principal to issue them to others in good faith, the rule is otherwise, and the maker is not bound by the guilty knowledge of his employee. This distinction is expressly drawn in *Phillips vs. Mercantile Nat'l Bank*, supra, cited by respondent, and is further pointed out or made apparent in the following decisions, in all of which the facts are closely parallel to those of the case at bar: (Citations of cases omitted.)

"The further contention is made by the defendant trust company in the present case that since Tschupp was authorized to make up the payroll, therefore, when he made a false payroll he was acting in the scope of his authority and in line with the reasoning of the above decisions bound the plaintiff by his guilty knowledge and intent. But that is another matter. The padding of the payroll was not the proximate cause of the *cashing* of the checks indorsed as they were. In determining whether the checks were payable to bearer under our statute, we are not concerned with Tschupp's authority in the company's other activities, but solely with his agential powers in the execution of checks; and as to that he had none.

"Can it be the law that where a company has hundreds of employees severally engaged in its multi-form activities, specific knowledge possessed by any one of them within the scope of his particular employment will be imputed to the company throughout the entire field of its operations and as affecting disconnected matters in charge of other employees not similarly advised? In answer it may be said making up a payroll is not disconnected but closely related to the matter of paying the wages called for thereby. But they are different functions and different in their causal affect, as this case illustrates. Authority is often divided in such concerns, one set of employees or officers making up requisitions and another scrutinizing and paying them for the very purpose of preventing frauds." * * *

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

AMERICAN SURETY COMPANY, a corporation,
and E. L. McDOUGAL,

Appellants,

vs.

THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION, a corporation,

Appellee.

APPELLEE'S BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon.

HONORABLE JAMES ALGER FEE, *District Judge.*

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In the United States
Circuit Court of Appeals
For the Ninth Circuit

AMERICAN SURETY COMPANY, a corporation,
and E. L. McDOUGAL,

Appellants,

vs.

THE BANK OF CALIFORNIA, NATIONAL AS-
SOCIATION, a corporation,

Appellee.

APPELLEE'S BRIEF

Upon Appeal from the District Court of the United
States for the District of Oregon.

HONORABLE JAMES ALGER FEE, *District Judge.*

APPELLEE'S STATEMENT OF THE CASE

The one hundred twenty-six checks involved in this litigation bore various dates from October 2, 1935, to April 21, 1939. These checks totaled \$6,562.33. The originals of nineteen of these checks, totaling \$950.39, were destroyed (R. 216) by Garth L. Crowe shortly

after they were intermittently received by him each month from appellee (R. 234-5). These nineteen checks bore various dates from May, 1936, to December 5, 1938 (R. 231, Ex. 2), and the names of the endorsers on the back thereof cannot now be shown or known (R. 244-5).

During said period of more than three and one-half years Garth L. Crowe cashed the checks by forging the names of the respective payees thereon. From August, 1934, to May, 1939, he was employed by Balfour, Guthrie & Co., Ltd. (Balfour), and not by its wholly owned subsidiary, Interior Warehouse Company (Interior) (R. 311). He was paid only by Balfour (R. 311) and had his desk in Balfour's offices (R. 310). Interior did not have separate offices in Portland (R. 310). Balfour kept Interior's books (R. 252). Crowe spent most of his working time for Balfour (R. 312), although he did spend about one hour a day on Interior's business (R. 312), for which subsidiary corporation he had the titles of clerk (R. 242) and book-keeper (R. 139).

Crowe's work and duties for Interior included the drawing of checks (R. 138-9) and having them prepared under his direction (R. 138-9, 167, 236), taking the checks to officials of Interior who were authorized to sign the same (R. 167), and accepting delivery of the same after they were signed, no one else receiving delivery immediately after the checks were signed (R. 236). He directed a girl to mail such checks as were to be mailed out (R. 237) and testified it was this re-

delivery to him which gave him his opportunity to forge the payees' names (R. 236). His work and duties for Interior also included having charge of Interior's paid checks and appellee's monthly statements concerning the same (R. 236), taking delivery of the paid checks and appellee's statements concerning them each month (R. 235, 309-10), to reconcile these bank statements (R. 237, 322), to examine paid checks and to notice the endorsements thereon (R. 307-9), and to detect forgeries on checks (R. 319). The statements read (Ex. 24), "Please examine at once. If no error is reported within ten days, the account will be considered correct."

Crowe's system of forgery over the three and one-half years involved included the addition of names to the dock superintendent's time book (R. 136, 240), to which he necessarily had access (R. 240). This was an original record book in which time of employees was entered by the dock superintendent (R. 243). His system also included the issuance of duplicate checks (R. 239, 224, 227, 228-9), the addition to the payrolls of names which did not represent then employees, i. e., either persons who had previously been employed or who never had been employed by Interior (R. 239-40, 224, 225), and the issuance of checks in the names of employees who had been paid by other means (R. 227-31). He also added to the records of the monthly summary sheets larger amounts than the dock payrolls showed were actually due (R. 248) and raised on original payrolls amounts otherwise properly due employees as shown by the dock superintendent's or the

country warehouses' time records (R. 248).

Necessarily Crowe's defalcations created actual discrepancies practically every month from 1935 to 1939 between appellee bank's monthly statements of Interior's account and Interior's own records (R. 249-50).

Interior's system and method of accounting had remained practically the same since its institution in 1900 (R. 320). Discovery of Crowe's defalcations was made in 1939. In the years prior to that time the same audit inspection was made as in 1939 without discovering the loss (R. 138). An annual audit of Interior at the instance and expense of either Interior or Balfour, was made by Price, Waterhouse & Company (R. 137). This was a limited audit each year (R. 289) based upon such an examination as would satisfy the auditors as to the substantial accuracy of the balance sheet of the subsidiary, Interior (R. 285, 289). In this respect it differed from a detailed audit (R. 288). As distinguished from this yearly audit the auditors, following discovery of Crowe's peculations, made a detailed study thereof (R. 221-232). It disclosed some direct entries in Interior's ledger (Ex. 19) which did not have supporting vouchers or support in books of original entry (R. 290).

Both Interior's dock and country warehouses furnished the original payrolls to the head office in Portland (R. 143, Exs. 21, 22 and 25), retaining carbon copies thereof (R. 144, Ex. 34). These were not inspected in the examinations for the annual audits

(R. 144). Such inspection would have shown that the nineteen forged checks listed on page 225 and the top of page 226 of the Record did not appear on the dock copy of the payroll (R. 144, 297, 303) and that only one of them appeared (R. 297, 303) on the dock time books (Ex. 23). The dock copy of the payroll was the basic record of the dock superintendent (R. 145-6). Crowe never had access to the carbons of either the country warehouse or the dock payrolls (R. 244).

Such examination would also have shown that of the twelve forged checks listed at the bottom of page 226 of the Record, only two of them appeared (R. 297, 303) in the dock time books (Ex. 23) and that of those twelve checks, two were issued in larger amounts (raised) than the amounts shown in the time books.

Such examination would further have shown that none of the thirty-seven forged checks listed on page 228 and the top of page 229 of the Record appeared on the carbons of the country warehouse payrolls which were supposed to support them (R. 282, 298-9) nor even on the original country warehouse payroll sheets (R. 298-9). It would also have shown that names had been inserted in the dock time books and erased after checks had been paid on such time (R. 301).

Except for the nine names added by Crowe to the dock superintendent's time books, none of the other checks in issue in this litigation, nor the amounts thereof nor the working time supporting the same, appeared in the dock superintendent's time books, the carbons of the dock payrolls or the carbons of the country warehouse payrolls (R. 243-4).

When Crowe took payroll checks to Interior's officials to be signed, he took the payrolls along (R. 150). These officials only checked these checks against the payrolls when signing the checks (R. 311, 323). No officer or employee of Interior ever checked the dock payrolls against the dock superintendent's time books (R. 323-4) or ever checked the paid checks against the dock superintendent's time book (R. 324). Aside from the annual audit and the payroll check when signing checks, no officer or employee of Interior ever made any check or inspection of Crowe's work (R. 321) except that:

"Q. Did you or to your knowledge any other officer or employee of the Interior, with the exception of Price, Waterhouse, ever make any check or inspection of Mr. Crowe's work? * * *

"A. A trial balance was taken off by Crowe every month and shown to the bookkeeper of Balfour, Guthrie & Company to check the control in Balfour, Guthrie's books.

"Q. That was Crowe's own trial balance?

"A. Yes.

"Q. Was any check made back against that to see if it was proper?

"A. No."

The Price, Waterhouse auditors had advised Interior that someone other than Crowe should reconcile the bank accounts (R. 140) but the Record shows that during the entire period of defalcation he was the only one who reconciled them (R. 237, 322).

One appellant, and the assignor of the other, had executed separate "loss" policies to Balfour and Interior covering these defalcations and, on the assump-

tion that an actual loss had been sustained by Interior, they paid the aggregate amount of the defalcations and the one, and the assignee of the other, seek here subrogation which was denied by the trial court. The opinion of the court below is reported in *44 F. Supp. 81*.

SUMMARY OF ARGUMENT

While specifying ten assignments of alleged error in their brief (pp. 9-14), appellants' argument is divided into but two branches, viz., whether appellee was liable to Interior, and now to appellants, for the \$6,562.33 aggregate of forged checks, an aggregate of \$950.39 of which have been destroyed, and whether appellants, by subrogation, are entitled to collect said larger aggregate sum from appellee.

When the insurers satisfied Interior's claim against them, they satisfied and paid the debt, which then ceased to have any existence, and without existence it did not constitute a claim to which appellants could be subrogated nor a claim which could be assigned to them. If there was a loss under appellants' "loss" policies, it could only be on the theory that appellee had paid out Interior's money and not its own money. The position of appellants in this case is exactly the reverse. They claim that in cashing the checks appellee paid out its own money and not the money of Interior.

Over the long period of time involved in this litigation Interior was negligent in failing within a reason-

able time to detect Crowe's forgeries. In this respect its system of accounting was defective or its method of operation thereunder was defective. Its failure in this respect misled appellee.

It permitted Crowe, its payroll clerk, to make up the payrolls, make up the checks, receive delivery of the executed checks for distribution, receive the paid checks at the bank and reconcile the bank statements. Interior's negligence would have estopped it from asserting the present claim, and the insurers can stand in no better position than Interior.

Appellants themselves could have sued the prior endorsers on the checks, and have no right to complain that appellee has not done so.

Where the equities are equal, or that of the defendant is superior to that of the plaintiff, or the plaintiff has merely discharged an obligation which is his own, the plaintiff cannot claim subrogation.

The proximate cause of this loss was the forging of the checks by Crowe, who was the principal in the bonds executed by these appellants. The local law requires affirmance of the judgment below.

ARGUMENT

I. ALLEGED LIABILITY OF APPELLEE

This topic is the first of the two branches of the argument in appellants' brief, and we answer it as such. They contend and cite authorities to the familiar

rule that in ordinary cases a bank is liable to its depositor when it pays out money on forged paper drawn on the depositor, on the theory that it is then paying out its own money and not that of the depositor.

The present case is not, however, an ordinary case. The facts above recited show either the use of a defective system by Interior or defective use and operation under a system, or both, and the use of either or both over a long period of time during which, as above demonstrated, a reasonable supervision over or check into Crowe's work and comparisons as between Interior's own records would have revealed the shortages caused by Crowe.

The facts show also that the two insurers executed "loss" policies in favor of Balfour and Interior, policies under which there could be no liability on the part of the insurers unless one of the insureds sustained an actual loss. The argument in the fore part of appellants' brief is, that in paying out on the forged paper, appellee paid out its own money, and not that of the insured-depositor.

**WAS THERE A LOSS TO WHICH APPELLANTS
COULD BE SUBROGATED OR A LOSS WHICH
CREATED A CHOSE IN ACTION WHICH
COULD BE ASSIGNED TO THEM?**

Ever since the case of

Price v. Neal (1762), 3 Burr 354, 97 Eng. Reprint 871,
1 W. Bl. 390, 96 Eng. Reprint 221

a bank has been charged with knowledge of its depositor's signature. Therefore, if a bank pays a check upon which the depositor's signature has been forged, it has been held that it pays out its own funds, and not those of the depositor.

Likewise, if a bank pays a check upon which the endorsement has been forged, it has been held that the payment will be considered to have been made out of the funds of the bank, and not out of the depositor's account, the theory being that the bank is under implied contract to pay checks—only to persons designated by the depositor. The foregoing are the rules announced in the ordinary cases relied on by appellants.

It has been held that in neither case is the bank permitted to charge the depositor's account with the amount of the check. Therefore, the depositor has suffered no loss to which the insurers could be subrogated, or which could be assigned to them.

Payment by the surety to the depositor (unless the former be a volunteer; see pp. 67-8 appellants' brief, where it is stated: "In fact, unless its payment is made pursuant to an obligation it cannot be subrogated, because it would be a mere volunteer and as such not entitled to subrogation.") could only be on the theory there was a loss in that the depositor's money was paid out by the bank. The only right the depositor would have to assign to the surety against the bank would be one based on the theory that the bank has still got the depositor's money; but by payment by the

surety to the depositor they both admit, or at least claim, a loss, thereby admitting that the bank has not got the depositor's money.

The policies themselves show on their faces that they are "loss" policies and not "liability" policies.

R. 179-80. "* * such pecuniary loss as the Employer shall have sustained * *"

R. 189 "This policy is to indemnify the Assured for any loss they may sustain * *"

R. 197. "Please pay all losses for our account to Messrs. Gardner, Mountain & D'Ambrumenil Ltd.

Balfour, Guthrie & Co., Limited * *"

R. 200. "This Policy is to indemnify the Assured for any loss they may sustain * *"

R. 205. "* * to pay or make good * * all such Loss or Damage as aforesaid as may happen to the subject matter of this Insurance * *"

The principle of election of remedies is so closely associated with the principles just discussed as to make it proper to treat them together.

ELECTION OF REMEDIES

The depositor has two separate remedies: (1) to deny the bank's right to charge the forged checks to the depositor's account, thereby claiming that the checks were paid with the bank's own money and not out of the account; (2) to make claim against the surety, thereby admitting, or at least claiming, that the checks were paid with the obligee's money.

These two positions are inconsistent and antagonistic.

9 C.J.S. 752

“A plaintiff who sues a drawee bank on a check paid by it on a forged indorsement takes the position that the bank still has his money, that the money paid out by the bank was the bank’s money, and that such payment was not binding on plaintiff; and, where he sues another who has indorsed such check over to the drawee bank, he necessarily takes the position that the money paid by the drawee bank was wrongfully paid and, therefore, wrongfully detained. Such positions are mutually contradictory, and in choosing his remedies plaintiff cannot adopt both positions.”

In the first remedy the bank suffers the loss and in some cases would be entitled to take an assignment against the surety which would then defend an action by the bank.

In the second remedy the surety would suffer the loss and, if it took any assignment against the bank, the latter would be obliged to defend.

National Surety Co. v. Perth Amboy Trust Co. (1935 3 C.C.A.) 76 F. (2d) 87, 90

“The right of action which Chase at one time may have had against the Trust Company arose out of its liability to make good to the Insurance Company its losses and out of the Trust Company’s guaranty of endorsements. But when the Insurance Company elected to sue Peterson (long before it was indemnified by the Surety Company) it lost its right to sue Chase and, through Chase, a right to sue its forwarding banks. Chase had not then (so far as we can learn from the record) made good the losses nor was it thereafter liable to an action by the Insurance Company; hence it no longer had a right of action against the Trust Company on its guaranty of endorsements

to which the Surety Company could be subrogated.

* * * *

“The claimed right of action of the Surety Company as assignee of Chase, which is very much the same as its claimed right of subrogation from Chase is based on the right of action which Chase perhaps originally had against the Trust Company on its guaranty of endorsements and on its liability to pay the Insurance Company for its losses. But Chase was relieved of its liability for honoring checks with forged endorsements and therefore lost its right of action against the Trust Company when the Insurance Company elected to sue Peterson for conversion, which was nearly a year before the Surety Company indemnified the Insurance Company under the forgery bond. Being thus relieved of its liability to the Insurance Company and, in consequence, not having suffered any loss for honoring checks with forged endorsements, and not being liable to suffer any loss in the future, Chase did not have, when it assigned its rights of action to the Surety Company, any action or right to sue the Trust Company on its guaranty of endorsements.”

Midland Savings & Loan Co. v. Tradesmen's Nat. Bank
(1932 10 C.C.A.) 57 F. (2d) 686, 693 (cert. denied 77
U.S. (L. Ed.) 334)

“It appears, however, that as to certain of the checks the Midland Company pursued Dewberry either by making a claim against his estate or accepting relief as against Dewberry and his estate. If this was done subsequent to the time the plaintiff acquired actual knowledge, as distinguished from suspicion, that Dewberry had forged the endorsements, or if the relief asked for or accepted was grounded upon the fact of his forgery, then under the rule laid down, *supra*, it elected to treat the entire proceeds of such checks as lawfully coming into his possession, and thereby ratified the act of the bank in paying out its money.”

United States Fidelity & Guaranty Co. v. Fidelity Nat. Bank & Trust Co. (Mo. 1937) 109 S.W. (2d) 47, 49

“When Continental obtained full knowledge of all the facts of Chaney’s forgeries and embezzlement, including the nature and amount of its loss, which it did prior to January 15, 1931, it had open to it two remedies. It could have demanded payment of its money from defendant on the theory that when defendant paid the checks on forged indorsements of Chaney the bank paid out its own money and not that of Continental. Since defendant had received Continental’s money on deposit and had never been legally authorized to pay it out, it still had Continental’s money and must account to Continental therefor. (Citing authorities.) Or it could have affirmed the act of the bank in paying out the money on a forged indorsement and, upon the theory that Chaney had its money, it could have pursued Chaney and sought and obtained the return of its money embezzled by him. (Citing authorities.)

“The two theories are inconsistent with each other. See above citations, especially the last two in the preceding paragraph. On January 15, 1931, either defendant had Continental’s money and was liable to it for money had and received, or Chaney had it and was liable for money had and received. Obviously, both could not have the same money at the same time. * * * Thus it will be seen that Continental took the position that Chaney had its money, demanded return of same from him, and claimed that he had converted it to his own use. Failing to get it from Chaney, it made demand upon Chaney’s bondsman, plaintiff, who had contracted with Continental, for a consideration, to indemnify the latter for any loss occasioned by Chaney’s embezzlement. Chaney could not be liable to Continental upon any theory of embezzlement unless the money alleged to have been embezzled was the property of Continental. That is hornbook law.

“When Continental, in possession of all of the facts, made demand, and when plaintiff, fully advised of the facts, paid the loss it had contracted to pay, the election of Continental was completed. Continental could not thereafter assert its claim against defendant, and, by no theory of reason or logic can plaintiff be in a better position than Continental in this respect.”

Union Guardian Trust Co. v. First Nat. Bank-Detroit
(1935 Mich.) 259 N.W. 912, 915

“On either theory recovery in the former case was necessarily based upon the fact that Josephine had the money belonging to the estate. If she had it, of course the bank did not have it. Therein lies the inconsistency between the former case and the present suit at law in so far as recovery is now sought on the basis of a contract obligation. Recovery *ex contractu* cannot be had in the instant case except upon the theory that the bank has in its possession the money deposited with it by Mary Jozefiak. Such an assumption is wholly inconsistent with the theory upon which the estate was decreed relief in the chancery suit. Because plaintiff previously elected between inconsistent remedies, it cannot recover on the ground of a contract obligation in the instant case.”

Insurance Co. of North America v. Fourth Nat. Bank
(1928 5 C.C.A.) 28 F. (2d) 933, 935

“Some adjustment of that suit was made by which it is stated, and not denied, that the plaintiff received certain property and funds from Cain and his wife, but the suit was not dismissed, no doubt because of the subsequent bringing and pendency of the present action. In such circumstances, we think the lower court was correct in holding that the plaintiff had made an election to pursue the property and funds in the hands of its agent, and could not thereafter maintain its claim for money had and received against defendant.”

— *Kaszab v. Metropolitan State Bank* (1932) 264 Ill. App. 358

In an action by depositor in Greenebaum Savings Bank & Trust Co. against a bank through which checks with forged endorsements of payee had cleared, a plea was made that depositor had previously sued drawee bank and lost. The plea was held good, the court at pages 362-3 saying:

“In other words, that the plaintiff, by his action against Greenebaum, refused to ratify the act of Greenebaum in paying the Metropolitan State Bank, but, by his action against Metropolitan State Bank he thereby took an inconsistent position in that he must necessarily ratify the action of Greenebaum Savings Bank & Trust Company in paying the defendant.

“Courts of law are open to litigants to furnish redress for injuries or damages sustained, *but it places upon the litigant the duty of electing the course he desires to pursue. If the actions are inconsistent, the courts place the responsibility of election on the one who seeks its aid and assistance.*” (Italics ours.)

This case was followed in

Golinkin v. First Union Trust and Savings Bank (1934) 276 Ill. App. 40, 42.

So in the case at bar the depositor had a choice upon discovering the alleged perfidy of its bonded employee, to disaffirm his action in endorsing the payees' names and to say to the bank that the bank had paid out its own money, and still had the depositor's money. Or it could affirm his act and look to the sureties, saying in effect to them that its employee had breached their

fidelity bonds and had embezzled its money. The depositor elected the latter remedy, filed its proof of loss which the sureties approved and paid.

It was obviously impossible for the money paid out on the checks to have been the money of the depositor for the purpose of securing speedy reimbursement from sureties, and the money of the bank for the purposes of the present suit. If the sureties intended to look to the bank and felt the bonded depositor had not been guilty of negligence in relation to the employee and the supervision of the bank account and returned vouchers permitting a recovery against the bank, they were obligated to refuse payment and advise the depositor that in fact and law it had suffered no loss and had no claim.

To relieve themselves of a part, at least, of their liability for the loss of insured property, brought about by the fault of a common carrier, insurers have used various contractual provisions. It is usual for carriers, in order to escape the loss, to insert in their bills of lading a provision that the carrier shall, in case of loss or damage to goods, have the benefit of any insurance effected on the goods. By such provision a payment by an insurer to the shipper would discharge, *pro tanto*, the latter's claim against the carrier and, such claim being discharged, there would obviously be no right of subrogation in the insurer of any right against the carrier.

To escape this consequence the insurers conceived the idea of making a loan to the insured, pending set-

tlement with the carrier, upon condition that it should be repaid to the extent that a recovery was obtained from the carrier.

Appellants could have made payment to Interior Warehouse Company in this case by means of a loan receipt and thereafter suit could have been brought in the name of the depositor. This method was approved in the case of a casualty payment in

Edgar F. Luckenbach v. W. J. McCahan Sugar Refining Company (1918) 248 U.S. 139, 39 S. Ct. 53, 63 L. Ed. 170.

But the sureties in the case at bar realized the negligence of the depositor in said particulars extended over many years; that there had been an apparent embezzlement, and they, therefore, approved and paid the claims. They now seek subrogation to specious rights which their insured, with all the facts before it (and with their approval), renounced, electing instead the theory that affirms the loss as the depositor's loss and the cashing of the checks as the embezzlement of the depositor's money—not that of the bank. The remedies, being inconsistent and each mutually destructive of the other, cannot in the nature of things be successively pursued—one by the depositor, the other by the sureties as a salvage attempt. Subrogation certainly cannot place the sureties in the shoes of the depositor as of a date prior to the election, but after and subject to the incidents of the election.

Tacit admission of the foregoing was made by one of appellants' attorneys at the trial below when he said:

R. 344-5 "I will say that there is some authority to the contrary, but whatever authority there is to the contrary, I can only reconcile it on this theory, that if we sue the endorser we certify the payment that the bank made, and so even on the theory of those who say we can sue such a person who gets it from the bank, if we did go after him it would be on the ground that we are abandoning any action that we have against the bank. * *"

The sureties could also have sued for a declaratory judgment.

II. APPELLANT'S ALLEGED RIGHT TO SUBROGATION

The opinion of the court below (*44 F. Supp. 81, 85*) upon which its findings and conclusions are based distinguished the case of

United States Fidelity Co. v. United States National Bank (1916) 80 Or. 361, 157 Pac. 155

upon which appellants so largely rely, and applied the law of the later case of

American Central Insurance Co. v. Weller (1923) 106 Or. 494, 212 Pac. 803

In the *United States Fidelity Co.* case the bank, after the depositor had exhausted his individual account, still honored his overdrafts on his individual account and charged them to his guardianship account. On page 157 the court said that the defendant:

"* * extended credit to Bridges on his individual overdrafts and immediately appropriated the money of others to their payment."

and further held that the defendant bank was in effect a joint tort-feasor.

The Weller case is digested on pages 85 and 87 of 44 *F. Supp.* by Judge Fee. The Weller case was heard in banc. Six judges concurred; one dissented. The case held that the insurer's payment to the bankers of the amount due on the automobile conversion policy satisfied the debt in that amount as against defendant, the guarantor of the debt by a separate and different contract. The court reviewed authorities allowing subrogation against third parties whose wrongful acts caused the loss and concluded on p. 807 of 212 *Pac.*:

"Weller as guarantor comes within the class that should be relieved under the rule mentioned. No one but the creditor, Ashley & Rumelin, could ask him to pay. When the insurance company paid the \$300 on the policy the debt was satisfied to that amount as to Weller, and could not be assigned."

Crowe was the principal on these surety bonds, whether he signed them as such or not. By those bonds the insurers bound themselves to answer to Interior for Crowe's defaults. Interior was the obligee-creditor, Crowe its bonded employee and the American and Lloyd's were the obligors-insurers-sureties.

Arant on Suretyship, p. 11

"The principal is the person for whose debt or default the surety or guarantor is liable. * * The principal is the person whose performance of duty is secured by the surety's promise. He is under a duty so to perform that the surety will not be molested by the creditor. In case the surety is required to pay, the principal is generally under a duty to reimburse him."

The American's policy provided (R. 180) :

“* * * through the fraud, dishonesty, forgery, theft, embezzlement, wrongful abstraction or wilful misapplication * * *”

The Lloyd's policy provided (R. 189) :

“* * * by reason of infidelity or dishonesty of any or all of their employees * * *”

In

Baker v. American Surety Co. (1916) 181 Ia. 634, 159 N.W. 1044, 1046

the defaulting treasurer of a union had been bonded by one of the appellants in the case at bar, the language of the bond (159 N.W. 1045) being similar to its bond which is involved in the case at bar. The treasurer forged checks of the union, or endorsements thereon, and the union sued on the bond. The defendant surety attempted to bring the union's bank in by cross-petition. In ruling that the allegations of the cross-petition did not entitle the surety to subrogation in the event it be required to pay the union's loss, the court said at p. 1046:

“If the surety is adjudged liable thereon and pays the alleged loss occasioned by Brown's dishonesty, it will merely pay Brown's indebtedness and not that of another, even though the other may also be liable therefor. At the most it is a case where each of two parties may be held for the dissipation of the same moneys, the bank because of paying out without authority, and the other fraudulently inducing the bank so to do. In such a case both are absolutely and neither entitled to subrogation, for either in paying is satisfying his own indebtedness. But the bank on payment undoubtedly could recover over from the wrongdoer. Moreover, the equities of the surety upon

payment would be measured by those, if any, existing in behalf of its principal, Brown, and, as between Brown and the bank, all are in favor of the bank, and under the rules stated subrogation must be denied. Otherwise the forger or his surety would be preferred to the one swindled by his forgeries."

Clearly Crowe is under a duty to reimburse the American and Lloyd's. Clearly no duty on the part of Interior was secured by the sureties' promises. The default of Crowe, the American and Lloyd's principal, was the proximate cause of the loss and, having paid the loss occasioned by the acts of their principal, the loss must fall upon them.

American Bonding Co. v. Welts (C.C.A. 9th) 113 C. C.A. 598, 193 Fed. 978, 980, 981

Here the plaintiff bonded a defaulting county auditor, paid the amount of the default to the county, and brought this action against the county treasurer, who cashed the defaulter's fraudulent warrants, and the county commissioners, who allegedly could and should have stopped the fraud. Judgment for the defendants was affirmed by Judges Gilbert, Wolverton and Ross, the latter stating:

"From the averments of the bills in these cases it is clear that the proximate cause of the county's loss and of the resultant loss to the appellant was the malfeasance of the auditor, for whose official honesty and faithfulness the appellant had bound itself. * * *

"What duty or obligation did the appellees or either of them assume towards the appellant in or

by the bond executed by it to Skagit county? None such are alleged in either of the bills, and none such are suggested, or can be suggested, by appellant's counsel, since no such duty or obligation existed. The fact that the treasurer and commissioners of the county had other and distinct duties required of them by law for the faithful performance of which they, too, were required to give bonds to the county did not enter into the considerations for and upon which the appellant's undertaking was executed."

In

National Surety Co. v. Arosin (C.C.A. 8th, Minn.) 198 Fed. 605, 609

the plaintiff, surety on the bond of a defaulting county auditor, sought to recover the amount of the default on false redemption warrants from Arosin, who was the county treasurer, the surety on his official bond and a bank which paid the warrants on forged endorsements. In affirming a decree for these defendants on these warrants the court said:

"The plaintiff seeks to hold the defendant Arosin and the defendant and appellee the United States Fidelity & Guaranty Company surety on Arosin's official bond, on the ground that the law required the treasurer to pay only by check and that when he made some payments to Bourne in cash over the counter he violated this law.

"It seeks to hold the National German-American Bank on the ground that it wrongfully paid out money of the county on forged indorsements.

"The same rule, however, must be applied to these three defendants as was applied to the State Savings Bank. The primary cause of the loss was the manufacture by Bourne of the false warrants and orders. For his official misconduct the plaintiff was liable."

United States Fidelity & Guaranty Co. v. Title Guaranty & Surety Co. (D. Ct. Md.) 200 Fed. 443, 447, 448, 449

Plaintiff surety bonded a bank to secure repayment of the state's deposits to the latter. Defendant surety bonded the state treasurer. When the bank failed plaintiff paid the state the amount of its deposit and brought this suit to recover that amount from defendant on the theory that the state treasurer had made the deposit in violation of law. In sustaining a demurrer to the bill the court said:

"There is but one question to be considered. Is there any reason why, in a court of conscience, the respondent should be required to make good complainant's loss? * * * If the state had not already been reimbursed by complainant, it could compel the respondent to make good its loss. If the state could do so, the complainant says it can, because it is subrogated to the state's rights. That does not necessarily follow. * * * When it is sought to exercise the right of subrogation, something more must be shown than that the defendant could have been compelled by the principal creditor to pay the debt to it. It must appear that, as between complainant and respondent, it is the latter and not the former which in equity should bear the loss.

* * * *

"Either surety could have held both or either of the principals for anything it had been compelled to pay in consequence of their breach of law. Under such circumstances the loss must fall upon *that one of the sureties whose principal's default was its proximate cause.*" (Italics ours.)

To the same effect are:

Commonwealth v. Farmers Deposit Bank (1936)
264 Ky. 839, 95 S.W. (2d) 793, 795-6.

United States Guarantee Co. v. Elkins (C.C.A.
3rd, 1939) 106 F. (2d) 136, 137.

This is not the usual case where the surety, having paid the amount of the principal's debt, seeks subrogation to the rights of the obligee against the principal. Nor is it a case where a surety or an insurer, upon paying the loss, seeks subrogation against a third person on the theory that the third person is a wrongdoer or defaulter or that he stands in the shoes of the wrongdoer or that he is primarily responsible for the wrong or default. Cases like such a case are relied upon by appellants on page 43 and elsewhere in their brief. We cannot distinguish them better than did Judge Fee in *44 F. Supp.* 85, where he said:

"These decisions neglect consideration of the fact that the forger is the only wrongdoer in the situation. Likewise, they neglect consideration of the highly equitable nature of subrogation."

In the present case the insurers, after sustaining the very loss they contracted and were paid to sustain, seek to recover the same from the appellee which, as to them, is an innocent third party. When a surety attempts to be subrogated to the rights of a creditor against third persons, who, on account of their relationship to the transaction in question, might be legally liable to the creditor but who are, in fact, innocent of any misconduct or negligence, the surety cannot recover.

WHERE EQUITIES ARE EQUAL OR DEFENDANT'S EQUITY IS SUPERIOR TO PLAINTIFF'S, PLAINTIFF CANNOT HAVE SUBROGATION.

Where the equities are equal, or where the defendant's equity is superior to that of the plaintiff, or where the plaintiff has merely discharged an obligation which is his own, the plaintiff cannot claim subrogation.

Commercial Cas. Ins. Co. v. Petroleum Pipe Line Co. (C.C.A. 10th, 1936) 83 F. (2d) 412, 414

"It is well settled that the right of subrogation does not obtain in favor of one who discharges a debt in the performance of his own obligation, nor where the equities are equal."

Amick v. Columbia Casualty Co. (C.C.A. 8th, 1939) 101 F. (2d) 984, 986

"Subrogation is enforced only in favor of a superior equity."

American Surety Co. v. Citizens' Nat'l. Bank (C.C.A. 8th, 1923) 294 Fed. 609, 616

"The right of subrogation is an equitable right, and where equities are equal the right does not exist and there can be no relief."

Southern Surety Co. v. Tessum (1929) 178 Minn. 495, 228 N.W. 326, 329-30.

In this case two guardians for an incompetent executed separate bonds with separate sureties thereon. Plaintiff, as one of such sureties, paid for a conversion by its principal and sued the other guardian and his

surety, contending that if it had not paid, the creditors could have sued defendant and his surety and recovered, and that plaintiff should now recover as subrogee of that right.

The court held otherwise, holding that even if the equities were equal, plaintiff could not prevail.

Appellants, on pages 46-9 of their brief, say that appellee's cases involve bonds protecting public officials and that in such cases the bond protects third persons from loss on account of official misconduct of the principal. Some of appellee's cases were of that character because the principle therein stated is the general principle, but many of the cases laying down the same principle do not involve bonds of that character.

In addition to the foregoing authorities, we draw the court's attention to these cases:

In

Meyers v. Bank of America (1938) 11 Cal. (2d) 92, 77 P. (2d) 1084

plaintiff's office manager had forged plaintiff's name on checks payable to plaintiff and had negotiated them to defendant Wascher, who deposited them in his account in defendant bank, which collected the checks from the drawers. Plaintiff's insurer paid him the amount of the defalcations and took an assignment which included the right to sue in plaintiff's name. The plaintiff sued for his assignee, and judgment for him was reversed, the court stating on page 1089:

"As stated hereinbefore, the right to maintain an action of this kind and to a recovery thereunder involves a consideration of, and must necessarily depend upon the respective equities of the parties. Here, the indemnitor has discharged its primary contract liability. It has paid what it contracted to pay, and has retained to its own use the premiums and benefits of such contract. It now seeks to recover from the bank the amount thus paid. It must be conceded that the bank is an innocent third party, whose duty to the employer was based upon an entirely different theory of contract, with which the indemnitor was not in privity. Neither the indemnitor nor the bank was the wrongdoer, but by independent contract obligation each was liable to the employer. In equity, it cannot be said that the satisfaction by the bonding company of its primary liability should entitle it to recover against the bank upon a totally different liability. The bank, not being a wrongdoer, but in the ordinary course of banking business, paid money upon these checks, the genuineness of which it had no reason to doubt, and from which it received no benefits. The primary cause of the loss was the forgeries committed by the employee, whose integrity was at least impliedly vouched for by his employer to the bank. We cannot say that as between the bank and the paid indemnitor, the bank should stand the loss."

Over pages 1086-1089 of the Meyers case opinion the court reviewed at length eight cases which support the opinion and cited with approval an additional eight cases which support it.

The Meyers case was cited with approval and followed in :

Jones v. Bank of America (Cal. App. 1942) 121 P. (2d) 94, 98-9.

State Bank v. Billstrom (Minn. 1941) 299 N.W. 199, 203.

National Surety Corporation v. Edwards House Co. (Miss. 1941) 4 So. (2d) 340, 341.

New York Title & Mortgage Co. v. First National Bank (C.C.A. 8th Mo.) 51 F. (2d) 485, 487 (cert. denied, 284 U.S. 676, 76 L. Ed. 572, 52 S. Ct. 131)

In this case the title company had issued title policies to a loan association, guaranteeing the association against loss by reason of defects in titles to mortgaged real estate. The loan association issued its checks, naming as payee the person who was supposed to own the property and to have signed the mortgages, but the mortgages were forgeries as were the notes secured thereby. The checks were delivered to a loan broker who purported to be an agent of the mortgagor, but who was in fact the person who was guilty of forging the mortgages and notes. This loan broker, in turn, forged the name of the payee on the checks, deposited them in his own account at the bank, and converted the proceeds. The title company reimbursed the loan association and brought suit against the bank on which the checks were drawn.

In deciding the case in favor of the bank the court held that satisfaction of its liability by the title company would not give rise to a right to recover against the bank under the doctrines of subrogation, stating on page 487:

“It is doubtful whether the mere fact that the loan company may have had two sources to which it might look for reimbursement would confer on the plaintiff the right of subrogation as to one of such sources. If we assume that neither the plain-

tiff nor the bank was the wrongdoer, but, by independent contract obligation, each was liable to the loan company, then the satisfaction of such primary liability by the plaintiff would not give rise to a right to recover against the bank under the doctrine of subrogation, the bank not being a wrongdoer. * * *

“But if there were any doubt as to the soundness of this position, we think it clear that plaintiff is not entitled to invoke the remedy of subrogation, because that right is an equitable one, and is applicable in cases in which one party is required to pay a debt for which another is primarily answerable, and which, in equity and good conscience, ought to be discharged by the latter. It is the method which equity employs to require the payment of the debt by him who in good conscience ought to pay it, and to relieve him whom none but the creditor could ask to pay. It cannot, as a matter of right, be invoked in all cases without regard to circumstances, but only in cases in which justice demands its application, and the rights of one asking subrogation must have a greater equity than those who oppose him.”

Washington Mechanics' Savings Bank v. District Title Ins. Co. (Ct. Appeals D.C.) 65 F. (2d) 827, 830

Here a check was prepared and signed by the title insurance company and placed in a file for future use. It was stolen from the file by an employee of the drawer who forged the name of the payee and deposited the check bearing the forged endorsement in the employee's account at the defendant bank. The defendant bank collected the proceeds from the drawee bank and the check in due course was returned as a canceled check to the drawer. The drawer was protected by a fidelity bond covering the dishonest employee and col-

lected under that bond. The drawer then instituted suit against the collecting bank.

The court held that the drawer, in the absence of insurance or indemnity, would have been entitled to recover from the collecting bank, but that having been paid by the indemnity company, the right to recover depended upon whether the indemnity company was entitled to subrogation. In reversing a judgment against the bank the court said on page 830:

“We are unable to see any particular in which the equities of the bonding company are superior to those of the appellant bank. Neither one was guilty of culpable negligence in the transaction. The bonding company, being in the business of guaranteeing for a consideration the faithful conduct of employees, enabled the defaulting employee to hold the position of trust which he occupied. The appellant bank was acting consistently with the ordinary course of banking business in accepting a check, whose genuineness it had no reason to doubt. It cannot be said that either one of these parties, as compared with the other, was primarily liable for the default. It follows that the equities of neither are superior to the equities of the other in the transaction. It appears that, had the appellant bank paid the loss to the title companies, it would not have been entitled to recover from the bonding company by reason of subrogation, nor is the bonding company entitled by subrogation to recover from the appellant bank.”

American Bonding Co. v. First National Bank, 27 Ky. L. 393, 85 S.W. 190

Here plaintiff had executed a fidelity bond covering an employee of an ice company who appropriated

his employer's money by means of raised checks. Upon paying the loss plaintiff brought this suit to recover from the bank which cashed the checks. In affirming dismissal the court said:

"It appears that the appellant, for a valuable consideration, had guaranteed the fidelity and honesty of the agent, Weitkamp—in other words, had become his surety—and had agreed, for this consideration, to pay any losses sustained by reason of the dishonesty of Weitkamp. In view of these facts, we cannot understand upon what principle of equity the appellant here is entitled to be subrogated."

ASSIGNMENT INEFFECTUAL

Appellant American claims only subrogation. Appellant E. L. McDougal claims under an assignment from Lloyd's (Ex. 14). The assignment to appellant McDougal adds no strength to his position. Even if he had an assignment from Interior, or an assignment from Lloyd's after Interior had assigned to it, it would add nothing to his rights here.

National Surety Co. v. Perth Amboy Trust Co.
(C.C.A. 3rd) 76 F. (2d) 87, 90.

Meyers v. Bank of America, 11 Cal. (2d) 92,
77 P. (2d) 1084, 1086.

Louisville Trust Co. v. Royal Indemnity Co.,
230 Ky. 482, 20 S.W. (2d) 71.

American Surety Co. v. Lewis State Bank (C.C.
A. 5th) 58 F. (2d) 559, 560-61.

American Bonding Co. v. State Savings Bank,
47 Mont. 332, 133 Pac. 367, 368.

DEPOSITOR'S NEGLIGENCE

In our statement of facts we delineated the responsibilities of Crowe, the clerk in charge of Interior's records, including the payrolls. We have shown how, over the three and one-half years the forgeries were taking place, Interior by consultation of its own records could have, with the exercise of reasonable diligence, discovered the fraud. To these various elements should also be added the further facts that on a number of the one hundred seven checks, the originals of which were introduced in evidence, Crowe, after forging the payee's name, endorsed his own, and that there is much repetition in the names of the various payees. These are additional factors in determining Interior's negligence. Under all of these circumstances the appellants are not entitled to recover here.

Young v. Gretna Trust & Savings Bank (1936) 184 La. 872, 168 So. 85, 89-90.

was a suit by the receivers of the employer to recover \$30,052 abstracted over a period of almost five years in the form of checks from \$2 to \$20 bearing the forged names of payees. A clerk, assistant to the timekeeper, helped in making up payrolls from time cards and in making up part of the checks. He made false time cards and punched them to show time allegedly due. He substituted false payrolls, based on these time cards, in place of the true. He used practically the names of the same individuals as payees. The court said:

"The Gretna Bank cashed the checks in question in the usual, ordinary manner, in good faith, and in due course of business. The evidence shows that none of the checks were cashed at the window of the Gretna Bank, but were all cashed by a Mr. Gerstner and a Mr. Wakefield, handbook operators, who subsequently cashed the checks at the various New Orleans banks, which sent them to the defendant for payment upon their respective indorsements thereof. Plaintiff's checks, after payment and cancellation, were returned to it monthly, together with a statement and notation thereon to please examine at once, and if no errors were reported in ten days, that the account would be considered correct.

"The fact that plaintiff, through its authorized officers and agents issued to designated parties these checks, which appeared on their face to be regular payroll checks, justified the defendant in believing that the payees thereof were regular employees of plaintiff and the indorsements thereon genuine. Moreover, the repeated issuance of the checks in the manner herein pointed out from week to week and year to year, and particularly during the last two years when the checks were made payable to the same named twelve employees, was not only sufficient to induce a cautious and careful person to believe and conclude that such checks were issued to plaintiff's bona fide employees and the indorsements thereon were genuine, but would also tend to place the bank in such a position that it could be imposed upon by plaintiff's trusted officer.

"The record conclusively shows that during the entire period during which the checks were fraudulently issued and cashed through Vanderbrook's manipulations, neither plaintiff's officers nor its employees ever made a single check of its payroll against the men actually employed or against the labor records. Plaintiff's own witnesses testified that had such a check been made, it would have

revealed Vanderbrook's fraud.

"A well-established rule of equity is applicable here, i.e., that 'where one of two innocent parties must suffer loss through the fraud of another, the burden of the loss should be imposed on him who most contributed to it.' * * *

"We are of the opinion that under the facts and circumstances of this case the carelessness, negligence, and laches of the plaintiff are the direct and proximate cause of the loss, and, therefore, it is estopped from claiming reimbursement from the Gretna Trust & Savings Bank, in liquidation."

The situation in

Defiance Lumber Co. v. Bank of California, N.A.,
(1935) 180 Wash. 533, 41 P. (2d) 135, 140

was much the same as in the case last cited. It involved the manipulation of time clocks and the cashing of the forged checks at different places. The court concluded:

"We are clearly of the opinion that appellant, by its careless and negligent conduct of its own business, permitted its own employee to perpetrate upon it a gross fraud, and that it cannot now recoup its losses by passing the burden thereof to respondent. Appellant set up the machinery which resulted in the loss, itself took into its employ the man who stole its money, continued him for a long period of time in a position of trust and authority, failing to observe, as we view it, the slightest care to see that it was protected against such fraud as was in fact perpetrated, either by some reasonable check of its employees, by adequately guarding its time clock or its time cards, or by maintaining an adequate system of accounting by which any such loss as that which occurred would have been avoided."

And the court also stated:

“The rule that a bank which pays a check upon a forged indorsement must stand the loss is limited to instances in which the acts of the depositor have not increased the risk lawfully resting upon the bank. The equitable doctrine that, as between two innocent persons, the one whose act was the cause of the loss should bear the consequences, applies in many cases. * * * Manifestly, * * * no specific rule can be laid down as to just what conduct on the part of the drawer of a check will constitute negligence sufficient to preclude him from holding the drawee bank liable for paying his check upon a forged indorsement; each case depending upon its own circumstances.”

In the case of

C. E. Erickson Co. v. Iowa Nat. Bank (1930), 211 Iowa, 495, 230 N.W. 342, 344

where the facts showed that payroll checks were fraudulently procured by an officer of the drawer, payable to former employees, and paid by the drawee bank upon the forged endorsement by the officer of such employees' names, the court said:

“If the drawee-bank in paying the check reasonably believed that the payee was a present employee, it might also reasonably believe that the indorsement was genuine. In such event the plaintiff would be chargeable with negligence in inducing the belief. * * * If in this case the representations of fact made on the face of the checks by Bridges, as the signer thereof, might reasonably be relied upon by the drawee, and if when so relied on they reasonably tended to relax further investigation on the part of the drawee, for its own protection, then they worked an estoppel against the plaintiff.”

In the case of

Kaszab v. Greenebaum Bank & T. Co., (1929) 252 Ill. App. 107, 114

where an employee padded his employer's payroll and cashed checks made payable to persons not in its employ, upon the forged endorsements of the names of such persons, it was held that the fact that the employee continued to forge endorsements for a period of nineteen months, during which time he cashed four hundred sixty-eight checks without being detected although monthly statements were furnished by the bank to the plaintiff, required the submission of the question of the employer's negligence to the jury.

In that case the appellate court of Illinois said:

"Banks deal with a great number of depositors and, while they owe an obligation to their customers, nevertheless, in view of the great number of transactions carried on in the course of a banking day, it becomes incumbent upon the depositor to assist by exercising some sort of supervision over his own individual account. It is not fair to the bank for such a depositor to ignore his own responsibility and rely solely upon the diligence of the institution with which he is doing business. This would appear to be particularly true where the depositor is in a better position to discover the fraud practiced upon him through the agency of an employee closely associated with and under his direct supervision and control."

United States v. Citizens Union Nat. Bank (D. Ct. Ky., 1941) 40 F. Supp. 609

Here the court, commenting on a Kentucky case holding that the drawer of a check was precluded from setting up forgery of the payee's name against the de-

pository bank where the drawer's own acts and conduct invited the forgery and made it possible, quoted therefrom as follows:

"The exception to the general rule springs from the just and equitable principle recognized in all jurisdictions that, where one of two innocent parties must bear a loss, it must be borne by the one whose conduct made it possible."

In the case of

Royal Indemnity Co. v. Federal Reserve Bank (D.C. Ohio, 1939) affirmed on District Judge's opinion in 119 F. (2d) 778, 38 F. Supp. 621, 623

the court, in commenting upon the cashing of forty-seven checks by the insured's agent forging the names of the payees thereon said that the insured, in permitting its agent to deliver checks, and in its failure to compare the purported signatures of payees with genuine signatures in its possession, was careless and negligent and therefore directly responsible for the forgeries. Recovery by the insured's surety against the bank was denied.

In addition to those of the above quotations which deal with the depositor's duty to examine and audit his bank account see:

Mattison-Greenlee Service Corporation v. Culhane (1937 D.C. Ill.) 20 Fed. Supp. 882, 886

where it is stated:

"A depositor owes his bank the duty to examine the statements of his account furnished him by the bank and report errors which he discovers or ought to discover therein without unreasonable delay. A depositor is charged with

notice of what a reasonable examination would reveal. When a depositor's agent, permitted to examine the bank statements, is the same person who embezzled from the depositor's account, the federal cases do not for that reason absolve the depositor. The latter, it is true, is not charged with the knowledge which his dishonest agent has, but he is charged with knowledge of such facts as a reasonable examination by an honest agent would disclose. * * *

"The general rule is that a depositor is charged with knowledge of such facts as a reasonable examination by an honest agent would reveal."

This rule is reflected in

England National Bank v. United States (1922 C.C.A. 8th) 282 Fed. 121, 126-7 (opinion by Justice Sanborn)

"It is the duty of a depositor, who receives such a statement and such paid checks, within a reasonable time to examine them, to ascertain whether or not the account is correct and whether or not the paid checks are just and legal vouchers for the amounts charged on the account of them, and, immediately upon the discovery of any error in the account, or any fraudulent altered or defective paid check or voucher, to notify the bank thereof, in order that it may at once proceed to protect itself before others exhaust the property of the wrongdoer who caused the loss; and the negligence or failure of the depositor to make the examination within a reasonable time, or speedily to notify the bank after his discovery of an altered, defective or fraudulent check or voucher, is in law a conclusive admission of the correctness of the account and the legality and justice of the vouchers, upon which the bank has the right to rely, and which the depositor may not consequently deny."

See also:

General Cigar Co., Inc. v. First Natl. Bank of Portland, Or. (C.C.A. 9th, 1923) 290 Fed. 143, 146.

PRIOR ENDORSERS

Appellants complain in their brief that appellee did not bring in the endorsers of the checks by third party practice. In the first place, that certainly could not be done with reference to the nineteen checks the originals of which were lost and not produced in court. The endorsers on them could not be ascertained.

In the second place, the appellants themselves could have sued the endorsers and have no right to complain that appellee did not do so.

Farmers' State Bank v. U. S. (C.C.A. 5th, 1932)
62 F. (2d) 178, 179.

Gustin-Bacon Mfg. Co. v. First National Bank
(1922) 306 Ill. 179, 137 N.E. 793, 795.

U. S. v. National City Bank (D.C. N.Y., 1939)
28 F. Supp. 144, 149.

MISSING ORIGINALS OF NINETEEN CHECKS

Neither the nineteenth check listed on page 231 of the Record nor a carbon copy thereof was placed in evidence. None of the originals of the first eighteen checks listed on that page were placed in evidence. Carbon copies of them were placed in evidence (Ex. 2) over appellee's objection (R. 27, 172). A sample of

one of these carbon copies appears on page 173 of the record.

Section 69-305, Oregon Compiled Laws Annotated, enacted long prior to the date of any check here involved, provides:

“The instrument must be exhibited to the person from whom payment is demanded, and when it is paid must be delivered up to the party paying it.”

PROXIMATE CAUSE

The principle of equity and good conscience is the deciding factor in all cases where subrogation is allowed, whether it be by assignment or not. The loss must always fall where the proximate cause rests.

United States Guarantee Co. v. Elkins (C.C.A. 3rd, 1939) 106 F. (2d) 136, 137

“The immediate and proximate cause of the loss was the forged endorsement of the check, specifically covered by the Forgery Bond.”

American Bonding Co. v. Welts (C.C.A. 9th, 1912) 193 Fed. 978, 980

“From the averments of the bills in these cases it is clear that the proximate cause of the county’s loss and of the resultant loss to the appellant was the malfeasance of the auditor, for whose official honesty and faithfulness the appellant had bound itself.”

To the same effect are:

Meyers v. Bank of America, 11 Cal. (2d) 92, 77 P. (2d) 1084, 1089.

United States Fidelity & Guaranty Co. v. Title Guaranty & Trust Co., (D.C. Md.) 200 Fed. 443, 449.

Commonwealth v. Farmers Deposit Bank (1936) 264 Ky. 839, 95 S.W. (2d) 793, 795-6.

CASES CITED BY APPELLANTS

A number of cases relied upon by appellants turned on the question of the bank's negligence, a different situation than that presented here. The action there was ex delicto and not on implied contract. Appellants have expressly stated in their brief that they rely on implied contract.

To hold a bank liable in an action ex delicto it is necessary to prove that the bank was a joint tortfeasor, i.e., that the bank had knowledge of the fraud.

Union Guardian Trust Co. v. First Nat. Bank-Detroit (1935) 271 Mich. 323, 259 N.W. 912, 916.

Commercial Sav. Bank v. National Surety Co. (C.C.A. 6th, 1923) 294 Fed. 261, 263-4.

Bank of Vass v. Arkenburgh (C.C.A. 4th, 1932) 55 F. (2d) 130, 132.

Quannah v. Wichita State Bank (Sup. Ct. Tex., 1936) 93 S.W. (2d) 701, 704.

Los Angeles Inv. Co. v. Home Sav. Bank, 180 Cal. 601, 182 Pac. 293

cited by appellants on pages 18, 24, 26, 29, 32, 38 and 39 of their brief, was an action by the depositor, not by an insurer, and the same is true of

Detroit Piston Ring Co. v. Wayne County and Home Savings Bank, 252 Mich. 163, 233 N. W. 185.

United States v. National Bank of Commerce
(C.C.A. 9th) 205 Fed. 433.

Board of Education v. National Union Bank, 16
N.J.M. 50; 196 Atl. 352.

The cases of:

Shipman v. Bank of State of New York, 126 N.Y. 318,
27 N.E. 371

(cited on pages 16, 20, 25, 30 and 40 of appellants' brief) and

American Sash & Door Co. v. Commerce Trust Co., 332
Mo. 98, 56 S.W. (2d) 1034

(cited on pages 18, 26, 29, 33 and 38 of appellants' brief) were actions by depositors, not by insurers, and in addition in neither case had the depositor entrusted to the wrongdoer, nor did the wrongdoer have, anything to do with the preparation or execution of the checks. In the case at bar Crowe prepared the checks for execution and was entrusted with delivery of them following execution.

The court in

First National Bank v. United States National Bank,
100 Or. 264, 197 Pac. 547, 557,

also cited by appellants, found that the equities of the defendant cashing bank were superior to those of the plaintiff drawee bank.

In an effort to escape the local law as exemplified by

American Central Insurance Co. v. Weller, 106 Or.
494, 212 Pac. 803

appellants, over pages 64-67 attack that case. The essence of the Weller case is that the plaintiff-insurer by separate and independent contract, insured the car against conversion and did not insure the balance of the debt due under the separate and independent conditional sales contract. The Weller opinion states that, while the facts were different, the principles of

Milwaukee Mechanics' Ins. Co. v. Ramsey (1915) 76 Or. 570, 149 Pac. 542.

were applicable.

In the Ramsey case the plaintiff fire insurer had, upon destruction of the building, paid the insurance money to the mortgagee as it was legally obligated to do. It then sued the mortgagor to recover the amount of this payment but was denied recovery in both the trial court and the supreme court. The essence of the decision, like that of the Weller case, is again separate and independent contractual liabilities, the court stating on page 544:

"It did not insure the debt. It insured the building. * * * The plaintiff did not pay Ramsey's debt, and hence has no privity with that obligation entitling it to subrogation."

We have heretofore in this brief quoted the insuring clauses of each of the policies involved. They show that it is the honesty of the employee which is insured, not any specific checks or any specific debt. Interior would have had claims against each of the insurers for any dishonest act on the part of Crowe during the course of his employment and which resulted in loss to Interior.

Denial of recovery on the said theory of separate and independent contractual obligations followed in each of the following cases:

Bowles v. Gantenbein (1917) 83 Or. 510, 163 Pac. 308, 163 Pac. 1163, 1165

Plaintiffs were sureties for the faithful performance of a lease by the lessee who, by defaulting, compelled payment of some rentals by plaintiffs. Defendant held a contract debt against the lessee. He sued thereon and attached. Claiming to be subrogated to the rights of the lessor, plaintiffs sued the defendant to enjoin prosecution of his action and to discharge his attachment. In refusing to do this the court said:

“In brief, the defendant holds a contract debt against the company. Its obligation to the plaintiffs is likewise upon contract. The two are in the same class. There is nothing in either claim to give one preference over the other. Where the equities are equal, the law will prevail.”

Underwood v. Metropolitan Nat'l. Bank, 144 U. S. 669, 12 S. Ct. 784, 36 L. Ed. 586, 590.

New York Title & Mortgage Co. v. First National Bank (C.C.A. 8th, 1931) 51 F. (2d) 485, 487.

American Bonding Co. v. First National Bank (Ky. A., 1905) 27 Ky. L. 393, 85 S.W. 190.

Louisville Trust Co. v. Royal Indemnity Co. (Ky. A., 1929) 230 Ky. 482, 20 S.W. (2d) 71.

See also

Plate Glass Underwriters' Mut. Ins. Co. v. Ridgewood Realty Co. (1925) 219 Mo. App. 186, 269 S.W. 659, 662 wherein it is stated:

“The insurance contract was one solely between the two parties thereto, and the insurance company only paid what it contracted primarily to do; but now, notwithstanding it still retains the premiums or the benefit of its contract, it seeks reimbursement from the landlord on the basis that the latter, under a wholly separate and independent contract, should have done so. We see no basis of subrogation arising out of the circumstances herein, and are of the opinion that the subrogation clause in the insurance contract only applies to circumstances in which the law creates the right of subrogation. The plaintiff insured the property itself, not a debt due the tenant. *Havens v. Germania Ins. Co.*, 135 Mo. 649, 658, 659, 37 S.W. 497. The mere fact that the tenant might thus have two sources to which he could look for repair or reimbursement does not give the plaintiff the right to be subrogated to that right as to one of such sources.” Citing cases.

United States Fidelity & Guaranty Co. v. Wooldridge, 268 U.S. 234, 45 S. Ct. 489, 69 L. Ed. 932.

Had appellants not paid Interior in full, Interior might have been able to make claim against appellee for the deficiency, but such claim would be predicated upon the separate contract between Interior and appellee. The situation would be much like that in

Western Surety Co. v. Walter (1921) 44 S.D. 112, 182 N.W. 635

where plaintiff had bonded a county treasurer and defendants, the then deceased treasurer's widow, father and brothers (see 177 N.W. 804) had given the county their note to cover the defalcations. The court said on page 637:

“In other words, we have a case where one party has entered into a collateral undertaking to secure or indemnify another against the results of official misconduct; after there has been official misconduct other parties give to the injured party a note, not to secure the payment of the undertaking given by the wrongdoer and on which the other party is a surety, but to secure the payment of any loss which the injured party may eventually suffer because of the wrongdoing.”

CONCLUSION

We respectfully submit that both under the local law, which the trial court was obliged to apply under the doctrine of the Erie case, and under the majority and better law in effect over the nation, the trial court's opinion, findings and conclusions and judgment were correct and should be affirmed.

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No. 10188

**In the United States
Circuit Court of Appeals
For the Ninth Circuit**

AMERICAN SURETY COMPANY, a Corporation, and
E. L. McDUGAL, *Appellants,*
vs.

THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION,
a Corporation, *Appellee.*

Appellants' Reply Brief

Upon Appeal from the District Court of the United States
for the District of Oregon

HONORABLE JAMES ALGER FEE, District Judge

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**In the United States
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AMERICAN SURETY COMPANY, a Corporation, and
E. L. McDUGAL, *Appellants,*

vs.

THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION,
a Corporation, *Appellee.*

Appellants' Reply Brief

Upon Appeal from the District Court of the United States
for the District of Oregon

HONORABLE JAMES ALGER FEE, District Judge

At the outset of its argument appellee recognizes the "familiar rule" of the liability of a bank to its depositor and then attempts to distinguish this case as being not an ordinary case to which the rule applies (Appellee's Brief, p. 9). This case is just as "ordinary" a case as the following leading cases:

Shipman et al vs. Bank of State of New York, 126 N. Y. 318, 27 N. E. 371.

Jordan Marsh Co. vs. Natl. Shawmut Bank, 201 Mass. 408, 87 N. E. 740.

Board of Education vs. National Union Bank, 16 N. J. M. 50, 196 A. 352, Aff'd. 121 N.J.L. 177, 1 A. (2d) 383.

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Los Angeles Invest. Co. vs. Home Savings Bank, 180
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Detroit P. R. Co. vs. Wayne County H. Sav. Bank,
252 Mich. 163, 233 N. W. 185.

American Sash & Door Co. vs. Commerce Trust Co.,
232 Mo. 98, 56 S. W. (2d) 1034.

*National Surety Co. vs. President & Directors of Man-
hattan Co.*, 252 N. Y. 247, 119 N. E. 372.

John G. Patton Co. vs. Guaranty Trust Co., 238 N. Y.
S. 362, 227 A. D. 545, Aff'd. 254 N. Y. S. 621,
173 N. E. 893,

all cited and discussed in the first part of Appellants' Brief, pp. 16-41. And it is also as "ordinary" a case as those cited at page 43 of Appellants' Brief under "Subrogation."

All these cases involved fact situations similar to those in the instant case, cases in which many checks were involved, extending over a period of time and wherein the acts of the employee could have been discovered *had the employer assumed that the employee was dishonest and based upon such assumption made a check up of his acts*. Because we desired to present the issues involved squarely to this Court, appellants limited themselves to cases with similar facts and we urge this Court to examine the complete opinions of each of said cases.

In contending that the instant case is an "unusual" case appellee is attempting to confuse the legal issues involved. Throughout appellee's brief counsel employ this device quoting excerpts from cases involving entirely dif-

ferent fact situations—cases not involving a drawer—drawee relationship—injecting a misapplied theory of election of remedies and citing *Kaszab vs. Greenbaum Bank & T. Co.*, 252 Ill. App. 107 (Appellee's Brief, p. 37), which was overruled by the later case of the *United States C. S. Co. vs. Central Mfg. District Bank*, *supra*, decided by the Supreme Court of Illinois.

Beginning at the bottom of page 9 and extending to page 11, appellee makes an "unusual" argument. It recognizes the rule of liability at p. 10, contended for by appellants and then states that in view of such rule of law, the bank is not permitted to charge the depositors' account and the depositor's money is still in the bank. Therefore it concludes the depositor has suffered no loss. Appellee reaches this conclusion in its brief but in the operation of its bank it did not so conclude when it charged its depositor's account with the amount of these checks. Its act in so doing, even though wrongful, constituted a loss to the depositor. *It has the depositor's money as the result of the application of the legal rules of liability which appellants claim are applicable* (see Appellants' Brief, pp. 16-41) and not because of its voluntary admission that it has.

A more legalistic argument or rather legalistic riddle to offer a court of equity looking to the substance of the transactions involved is hard to imagine. It is akin to the stock metaphysical argument introduced to freshman college students on the non-existence of physical objects.

The adoption of appellee's contention would eliminate subrogation in every case of a payment by an insurer to an insured. It is not the law, as shown by the many cases cited in Appellant's Brief which permitted the insurer to recover (Appellants' Brief, p. 43) and that it is not the law in Oregon is clear from the Oregon Supreme Court's decision in *United States Fidelity Co. vs. United States National Bank*, 80 Or. 361, 157 P. 155.

Appellee is engaging in a play of words in this argument and in its contention that these are "loss" policies and not "liability" policies. We refer this Court to the case of *Grubnau vs. Centennial Natl. Bank*, 124 A. 142, 279 Pa. 501 (cited in Appellants' Brief at p. 43 and p. 58) and to our argument in Appellants' Brief, pp. 58, 59.

Beginning at page 11 and extending to page 19, appellee deals with election of remedies. Here again counsel for appellee is using legalistic reasoning to confuse the Court as to the issues in this case and citing cases and quoting legal principles which have no application to the instant case.

Election of remedies does not deal with a choice of recovery by an insured from its insurance company as against a recovery from a third party responsible to it for the loss by operation of legal rules of liability, but deals with a choice by such person of its legal remedies as between two or more parties legally liable to it for the loss by the operation of legal rules of liability. The remedies involved in such situations arise because of transactions of the parties which gives rise to the loss.

As pointed out at page 66 of Appellants' Brief, "If the acceptance by an insured of payment of a loss payable to it by an insurance company constituted an election of remedies, there never could be a case whereby an insurance company was subrogated to the rights of its insured." (See also quotation from *Chicago etc. R. Co. vs. Pullman*, 139 U. S. 79, 11 S. C. 490, 35 L. Ed., quoted by the Supreme Court of Oregon in *American Central Insurance Co. vs. Weller*, 106 Or. 494, 212 P. 803, set forth in Appellants' Brief at p. 66.)

Furthermore, as pointed out in Appellants' Brief, pages 58 and 59, such a view would cause insurance companies to compel an insured to first proceed against the third party and then pay the insured only after it has failed to recover from the third party. The courts have progressed, see *Grubnau vs. Centennial Natl. Bank*, supra, and permit the insurance companies to pay their insured directly and acquire the insured's rights by subrogation.

On page 18 counsel for appellee suggest that "Appellants could have made payment to Interior Warehouse Company in this case by means of a loan receipt and thereafter suit could have been brought in the name of the depositor."

Is such a practice to be encouraged by courts? Should insurance companies and their insureds be compelled and encouraged to play a game of make-believe? The Honorable Trial Court's decision will force them to (see Appellants' Brief, pp. 58 and 59), and counsel for appellee

themselves suggest it. Is it not better to recognize the realities of the situation as did the Supreme Court of Pennsylvania in *Grubnau vs. Centennial Natl. Bank*, supra, and the courts in the other cases cited in Appellants' Brief?

Counsel then quote (Appellee's Brief, p. 10) from 9 C.J.S. 752 a statement which does deal with an election of remedies. But note that the text is dealing with the choice of the depositor to recover from the drawee bank as against a person who indorsed the check subsequent to the forged indorsement. The right to recover arises from operation of legal rules of liability springing from the relationship of the parties as a result of dealing with the forged checks. The text in no way attempts to nullify or remove from an insurance company which in no way came into a legal relationship with the depositor by reason of any transactions with the forged checks, the right of subrogation.

With reference to the cases cited by appellee in this portion of the argument, it is to be observed that neither the Interior Warehouse Company, the named insured, nor the appellant insurance companies, sued or attempted to collect the loss from Crowe or any of the indorsers on the checks, all of whom, according to appellee, were also liable to the insured. *As between those parties and the appellee bank*, the depositor had an election of remedies and not having exercised an election, its insurance companies who were subrogated to its rights upon their payment of the loss acquired its rights against appellee. (See

cases Appellants' Brief, p. 43, *United States Fidelity Co. vs. United States Natl. Bank*, supra, 80 Or. 361, 157 P. 155.)

That this entire argument on election of remedies is purely legalistic and a play upon words rather than the application of sound legal principles which should govern the rights of the parties is tacitly admitted and disclosed in the following statement by counsel at page 17 of the brief:

" . . . If the sureties intended to look to the bank and felt the bonded depositor had not been guilty of negligence in relation to the employee and the supervision of the bank account and returned vouchers permitting a recovery against the bank, *they were obligated to refuse payment* and advise the depositor that in fact and law it had suffered no loss and had no claim." (Emphasis ours.)

It is submitted that the law does not require an insurance company to first refuse payment and compel its assured to seek recovery from a third party and it is also submitted that this should not become the law by the application of a legalistic and misapplied argument of the principle of election of remedies.

At page 18 counsel state that "Subrogation certainly cannot place the sureties in the shoes of the depositor as of a date prior to the election, but after and subject to

the incidents of an election.” Here again confusion of the issues is sought. *No election was made by the depositor* and appellee is attempting to make the payment which gave rise to the right of subrogation an act of election to then contend that an election occurred prior to the subrogation. Such a theory, if applied, would destroy the principle of subrogation; the act giving it birth would also be its death.

The closing sentence in counsel’s argument (Appellee’s Brief, p. 19) that “The sureties could also have sued for a declaratory judgment” also shows the weakness of the whole argument of appellee and its failure to squarely meet the issues. No need existed for invoking a declaratory judgment proceeding. The correct and direct proceeding was instituted by an action against the bank, and the bank in turn should have invoked the procedure provided by Rule 14 (a) of the Rules of Civil Procedure, bringing in the third parties liable over to it. Such procedure appellee purposely declined to follow, no doubt for business reasons, because it would involve its customers and sister banks, and such procedure counsel for appellee ignore in Appellee’s Brief. Instead of facing and recognizing a procedure specifically provided for a situation as presented by the instant case, appellee ignored same and now suggests a declaratory judgment proceeding. Such suggestion by eminent counsel for appellee bears out the charge heretofore made that throughout their brief counsel seek to confuse the clear cut issues which are present and which determine the case.

In answer to appellee's argument (Appellee's Brief, pp. 19 and 20) that the Court below distinguished the Oregon case of *United States Fidelity Co. vs. United States National Bank*, 80 Or. 361, 157 P. 155, and applied the law of the later case of *American Central Insurance Co. vs. Weller*, 106 Or. 494, 212 P. 803, we urge this Court to reread our comment on pages 60, 62-67 of Appellants' Brief, and also to examine those cases. The *Weller* case in no way overrules the *United States Fidelity Co.* case and the latter case by its citation and quotation from the United States Supreme Court case of *Chicago, etc. R. Co. vs. Pullman*, 139 U. S. 79, 11 S. C. 490, 35 L. Ed. 97, recognizes the law as contended for by appellants.

Appellee's argument then proceeds with cases in which a defaulting official obtained a bond and the surety was denied subrogation. To bring itself within the rule of these cases, counsel state that Crowe was the principal on the bonds in question. We submit he was not, but that the policies were insurance policies issued to the Interior Warehouse Company. The company and not Crowe paid the premiums and the company was an insured rather than Crowe being a principal. The policies were for the benefit of Interior Warehouse Company and no one else. Furthermore, as pointed out in Appellants' Brief (pp. 46-56) some confusion does exist in the decisions of the courts in not clearly recognizing the basis of the law denying recovery to a surety of a governmental official and applying it indiscriminately. The Oregon Supreme

Court, however, did evidently recognize this distinction in *United States Fidelity Co. vs. United States National Bank*, supra, when it allowed the surety on the bond of a guardian to recover from the bank and it is this law of Oregon that must be applied to the instant case.

Appellee's Brief then continues (pp. 26-32) with the argument based upon the principle that where the equities are equal, or where the defendant's equities are superior, no recovery can be had by subrogation. In support of same, cases are cited which do not deal with facts like those in instant case involving a drawee-drawer relationship.

The case of *Meyers vs. Bank of America*, 11 Cal. (2d) 92, 77 P. (2d) 1084, which involved the forgery of checks payable to the *plaintiff* is discussed in Appellants' Brief commencing at page 52.

The case of *Jones vs. Bank of America* (Cal. App. 1942), 121 P. (2d) 94, 99, also did not deal with a drawee-drawer relationship and the court specifically holds and points out that a drawee bank is not liable to a payee of a check whose indorsement is forged because there is no privity between the bank and the payee of the check. The court does recognize, however, that a drawee bank is in privity with the drawer and it is responsible to the drawer, its depositor. The court likewise distinguishes such a case from a case between a drawee bank and a collecting bank citing *George vs. Security Trust & Savings Bank*, 91 Cal. App. 708, 267 P. 560.

State Bank vs. Billstrom (Minn. 1941), 299 N. W. 199, also cited as following the Meyers case, likewise involved a different fact situation and is a clear case of a bond of an official which bond is for the benefit of everyone, the court saying at page 201:

“The official bond of Billstrom is for the benefit of any one injured by his delinquency. Mason Minn. St. 1927, Sec. 9698.”

The case of *National Surety Corp. vs. Edwards House Co.* (Miss. 1941), 4 So. (2d) 340, cited as following the Meyers case likewise involved the bond of a governmental official and was not against a drawer bank which breached its contract with its depositor.

The facts in the case of *New York Title & Mortgage Co. vs. First Natl. Bank* (C.C.A. 8th), 51 F. (2d) 485, are entirely different from those present in the instant case as will be apparent to the Court from a mere reading of the opinion. The plaintiff in that case was insuring against defects in titles. Certificates of titles were forged, as well as checks. The court clarifies the opinion and shows it has no application to the instant case, at p. 487:

“ . . . The plaintiff here did not insure against the forgery of indorsements on these checks, but its contract was confined to the titles of the purported borrowers.”

The case of *Washington Mechanics' Savings Bank vs. District Title Ins. Co.* (Ct. Appeals D. C.), 65 F. (2d) 827, was an action by the drawer against the collecting bank (Appellee's Brief, p. 31). The court injects into the law the concept of "culpable" negligence, which as shown in Appellants' Brief, p. 50, in the quotation from the Martin case (*Martin et al vs. Federal Surety Co.* (C.C.A. 8th), 58 F. (2d) 79) has been erroneously injected into the question of the right to subrogation. In the quotation set out in Appellee's Brief at page 31, the court states that the collecting bank accepted a check "whose genuineness it had no reason to doubt." The drawee bank, however, is duty bound to its depositor—an absolute duty—to know that the indorsements are genuine and accepts the checks at its own peril. Hence, there are no questions of equities in its favor when it breaches its contract.

American Bonding Co. vs. First National Bank, 27 Ky. L. 393, 85 S. W. 190, involved raised checks and did not involve a drawee bank which is in privity with and is duty bound to its depositor as is appellee in this case.

Appellee admits the rule of law as to the drawee bank's liability to its depositor. Having breached its contract, it is a wrongdoer, regardless of good faith, and cannot claim superior equities. *United States Fidelity Co. vs. United States Natl. Bank*, *supra*.

The next point urged in Appellee's Brief (pp. 39-40) to defeat appellants' recovery is the negligence of the Interior Warehouse Company in failing to discover the

dishonest acts of Crowe. Appellee's statement of the case (from p. 4 to p. 6) lays emphasis on matters which show *now* how the defalcations could have been discovered. From this it is pointed out that if certain things were done the forgeries could have been discovered. Interior Warehouse Company proceeded upon the assumption that its employee was honest. Acting upon such assumption is wrong according to appellee.

Appellee's statement of the case and the conclusion it draws therefrom is that an employer should not assume its trusted bookkeeper is honest, but should assume he is dishonest and in assuming that Crowe was honest, appellants were negligent. Under appellee's reasoning and analysis, a reasonably prudent employer should assume its bookkeeper to be dishonest and upon such assumption should proceed to supervise and check his conduct in minute detail.

Is it negligence on the part of an employer to assume an employee is honest? Is it negligence on the part of an employer to trust an employee? Although appellee's statement of the case is an argument that it should be, neither business practice nor the courts condemn employers, as do counsel for appellee, for their failure to assume that their employees are dishonest. See quotation from *Los Angeles Invest. Co. vs. Home Sav. Bank*, *supra* (180 Cal. 601, 182 P. 293), at page 39 of Appellants' Brief.

At page 33 of Appellee's Brief it is stated that on a number of checks Crowe, after forging the payee's name

indorsed his own. This occurred on only nine checks out of the total of 107 and not more than 2 of which were in the same month (Tr., pp. 46-58).

In our opening brief, beginning on page 28, and through page 41, we discuss fully the law with reference to the question of the depositor's negligence. The following cases, many of which have already been cited, support our position, first, that the Interior Warehouse Company was not negligent, and second, that its failure to discover the forgeries did not relieve the bank:

Shipman vs. Bank of State of New York, 126 N. Y. 318, 27 N. E. 371.

United States Cold Storage Co. vs. Central Mfg. Dist. Bank, 343 Ill. 503, 175 N. E. 825, 74 A.L.R. 811.

American Sash & Door Co. vs. Commerce Trust Co., 56 S. W. (2d) 1034 (Mo.) (See Note in 103 A.L.R. 1152).

Detroit Piston Ring Co. vs. Wayne County, etc., 252 Mich. 163, 233 N. W. 185, 75 A.L.R. 1273.

R. E. Land, Title & Trust Co. vs. United Sec. etc., 303 Pa. 273, 154 A. 593.

Board of Education vs. Natl. Union Bank, 196 A. 352 (Aff'd) 1 A. (2d) 383 (N. J.).

Los Angeles Investment Co. vs. Home Savings Bank, 190 Cal. 601, 182 P. 293, 5 A.L.R. 1193.

Jordan Marsh Co. vs. Nat'l. Shawmut Bank, 201 Mass. 397, 87 N. E. 740, Note 74 A.L.R. 827.

Natl. Surety Co. vs. Natl. City Bank, 172 N.Y.S. 413, Note in 74 A.L.R. at 828.

Natl. Surety Co. vs. President & Directors of Manhattan Co. et al., 252 N. Y. 247, 169 N. E. 372, 67 A.L.R. 1113.

Natl. Metropolitan Bank vs. Realty & Title Co., 47 F. (2d) 982.

City of N. Y. vs. Bronx County Trust Co., 184 N. E. 495, 261 N. Y. 64.

John G. Patton Co. vs. Guaranty Trust Co. of N. Y., 238 N.Y.S.362, aff'd. 254 N.Y.621, 173 N.E.893.

All of these cases deal with the question of the depositor's negligence and the duty it owes the bank with reference to examining the bank statements. The facts in the instant case are similar to the facts in said cases and under the law of said cases, the Interior Warehouse Company was not guilty of negligence *such as to relieve the defendant of liability*. Furthermore, as pointed out by the courts in several of said cases, *negligence of the depositor to defeat recovery from the bank must be the "proximate cause"* and *in view of the fact that the bank in accepting the checks through the clearing house relied upon the indorsements of the collecting banks, the failure of the depositor to discover fraudulent acts was not the proximate cause*. The decision of the various courts discuss these points so clearly that we urge this Court to read these opinions rather than be burdened with further discussion by appellants' counsel.

Appellee cites the following four cases:

Defiance Lumber Co. vs. Bank of California, 180 Wash. 533, 41 Pac. (2d) 135.

C. E. Erickson vs. Iowa Natl. Bank, 211 Ia. 495, 230 N. W. 342.

Young vs. Gretna Trust & Savings Bank, 184 La. 872, 168 So. 85.

Kaszab vs. Greenebaum Sons Bk. & T. Co., 252 Ill. App. 107.

The last cited case decided by an intermediate appellate court of Illinois cannot be viewed as an authority in view of the later case of *United States C. S. Co. vs. Central Mfg. Dist. Bank*, supra, decided by the Supreme Court of Illinois which leaves no doubt as to appellants' right to recover.

The Washington case of *Defiance Lumber Co. vs. Bank of California*, supra, was decided by a divided court 5 to 4. The majority opinion ignores all the leading cases cited above which are called to the reader's attention by the dissenting opinion. The dissenting opinion ably shows that "the negligence of the drawer is immaterial unless it proximately affects the conduct of the bank in the performance of its duties," citing among other cases the *American Sash & Door Co. vs. Commerce Trust Co.*, supra, *Shipman vs. Bank of State of N. Y.*, supra, and *United States C. S. Co. vs. Central Mfg. Dist. Bank*, supra. The majority opinion also relies upon the "imposter" rule which clearly does not apply.

The case of *C. E. Erickson Co. vs. Iowa Natl. Bank*, supra, is ably answered by the Supreme Court of Missouri in the case of *American Sash & Door Co. vs. Commerce Trust Co.* (cited above), 56 S. W. (2d) 1034, at page 1039, wherein that court reviews all the decisions including those cited by appellee.

The result in the case of *Young vs. Gretna Trust & Savings Bank*, supra, is reached by the Louisiana court following the other three cases cited by appellee, one of which has since been overruled.

The case of *Royal Indemnity Co. vs. Federal Reserve Bank* (D. C. Ohio 1939), 119 F. (2d) 778, affirmed on District Judge's opinion, 38 F. Supp. 621, relied upon by appellee, did not involve an action between the drawer and the drawee bank, but an action by the drawer against a bank guaranteeing prior indorsers.

The case of *Mattison-Greenlee Service Corp. vs. Culhane*, 20 F. Supp. 882, the next case cited in Appellee's Brief, involved an entirely different fact situation and different rules of law than those governing the facts in the instant case which are clearly governed by the well established legal principles laid down in the cases heretofore cited and called to this Court's attention.

The case of *England National Bank vs. U. S.*, 282 F. 121, deals with an alteration on the face of the checks. The names of the payees in the check were erased and new names were inserted. The duty of the drawer to discover alterations on the face of checks returned to him

with the monthly statement is different from his duty to check indorsements and this difference is noted in all the cases heretofore cited by appellants dealing with the merits of this case.

Appellee raises the question of the missing originals of nineteen checks and cites Section 69-605, O.C.L.A., which is part of the Negotiable Instruments Act. This statute as well as Sections 69-603 and 69-604, O.C.L.A., all deal with the question of presentment and have no application to the instant case. Here again counsel for appellee are injecting a legal principle clearly inapplicable and merely to cause confusion of the clear cut issues.

This is an action for the breach of a bank's contract with its depositor by violating its contractual duty and not an action based upon a negotiable instrument in circulation. Appellants are not suing appellee for its failure to pay checks presented to it for payment and which appellee has declined to pay. The sections of the act cited presupposes valid instruments the holders of which are entitled to payment when the same are tendered. The instruments in question were forged and therefore void and invalid. Appellants are not presenting any checks to the appellee for payment but are demanding that appellee pay them for the amount of checks which it wrongfully charged to its depositor's account.

In closing, we cite to this Court the case of *United States vs. Natl. Bank of Commerce* (C.C.A. 9th), 205 F. 433, a decision by Judges Gilbert, Morrow and Wolverton, that it was not necessary for the depositor to tender the

checks involved as a necessary preliminary to the commencement of the action. The appellee in the instant case, as the defendant did in that case, made an absolute and unconditional refusal to pay.

We also cite this case for many of the propositions and contentions heretofore made in this brief because the court dealt with many of the same problems. This case also shows that appellee bank, as we have pointed out above, is not in the class of innocent third parties with superior equities so as to defeat appellants' right to be subrogated. At p. 438 the court makes the following statement which applies to appellee bank in the instant case:

“It was their duty to ascertain whether there was such a person as the payee named in the checks, and to know that the person who presented the checks was entitled to receive the payment thereof. They made no investigation, required no identification, and took no precaution. *They paid the money negligently, and at their own risk, and the defendant bank in choosing to rely upon the identification of the payee by the banks which cashed the checks did so at its own risk.*” (Emphasis ours.)

This, we reiterate, was the cause of the loss, not the original dishonest acts of Crowe, because had this duty owing to a depositor been performed, no payment would have been made on these checks.

CONCLUSION

With reference to the appellee's liability, appellants have presented this Court with all the available authority on the subject, and under the authorities of the cases cited, involving similar fact situations, or by original application of recognized principles of contract and banking law, the appellee is liable for the breach of its contract with its depositor. The appellants being in the position of the depositor by subrogation, are entitled to recover the amount paid out by the appellee on these checks bearing forged indorsements.

Respectfully submitted,

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No. 10189

5

United States
Circuit Court of Appeals

For the Ninth Circuit.

EMPIRE OIL AND GAS CORPORATION, a corporation, and CHESTER WALKER COLGROVE, trading as Colusa Products Company,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

FEB 13 1943

PAUL P. O'BRIEN,

CLERK

No. 10189

United States
Circuit Court of Appeals

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States Within
and for the Northern District of California,
Southern Division

F. D. C. No. 6408

March Term, 1942.

UNITED STATES OF AMERICA,

vs.

EMPIRE OIL AND GAS CORPORATION, a
corporation, and CHESTER WALKER COL-
GROVE, trading as Colusa Products Company.

INFORMATION No.

(27554-R)

Frank J. Hennessy, Attorney for the United States in and for the Northern District of California, who for the said United States in this behalf prosecutes, in his own proper person comes into court on this 24th day of March, A. D., nineteen hundred and forty-two, and with leave of court first had and obtained, gives the court here to understand and be informed as follows, to wit:

That Empire Oil and Gas Corporation, a corporation organized and existing under the laws of the State of Nevada, and Chester Walker Colgrove, President and Treasurer, said corporation trading under the fictitious name of Colusa Products Company, at Berkeley, State of California, did, within the Southern Division of the Northern Judicial District of California, and within the jurisdiction

of this court, on or about the 31st day of January, in the year nineteen hundred and forty-one, then and there, in violation of the Act of Congress of June 25, 1938, known as the Federal Food, Drug, and Cosmetic Act (52 Statutes at Large, 1040; 21 U. S. C., 331 (a), 352 (a),) unlawfully introduce and deliver for introduction in interstate commerce, from Berkeley, State of California, to Mountainair, State of New Mexico, consigned to Snapp's Drug Store, [1*] a certain package containing a number of bottles, each bottle containing a drug within the meaning of Section 201 (g) (2) of said act.

Displayed upon said bottles was the following labeling:

COLUSA

NATURAL OIL

A NATURAL

UNREFINED

PETROLEUM OIL

Containing

Sulphonated

Hydrocarbons

For External Use Only

Net Cont. 2 Fl. Ozs. (or "1/2 Fl. Oz.")

COLUSA

PRODUCTS CO.

WILLIAMS, CALIF.

An emollient natural petroleum product produced in Colusa County, California.

*Page numbering appearing at foot of page of original certified Transcript of Record.

DIRECTIONS: Apply to affected parts and rub it in thoroughly for relieving the irritation of minor cuts and burns and to relieve the itching and discomfort of minor skin abrasions.

Enclosed in said package and accompanying said drug was a certain circular and newspaper mat, which contained, among others, the following statements:

(Circular):

In 1934, "Walter" worked in one of Los Angeles' swanky clothing stores. His hands and feet became afflicted with Athlete's Foot or Ringworm. The resulting discomfort, pain and unsightliness became so bad that he was forced to give up his position. In 1940 a friend induced him to try "Colusa Natural Oil." Six weeks later "Walter" was back at work selling on his old job and he is also doing a lot of selling of "Colusa Natural Oil." He tells why—"That oil sure helped my condition. It not only relieved the irritating, painful itching, but it helped to relieve the unsightly blemishes on my hands so I was able to go back to work."

* * * * *

* * * COLUSA NATURAL OIL CAPSULES

* * * have an alkalizing action. * * *

* * * * *

* * * great healing qualities. * * * [2]

Nature has so wonderfully blended this natural alkaline oil that it is received by the

human body and seems as acceptable as food
or sunshine.

* * * * *

LOOK AT THESE HANDS!

Before Treatment with Colusa Natural Oil

(February 28, 1940)

Twelve days after starting treatment with
Colusa Natural Oil (March 11, 1940)

ECZEMA

“Colusa Natural Oil—used externally—and
Colusa Natural Oil Capsules—taken internally
—are the only treatments I used in clearing up
this terrible condition in TWELVE DAYS as
pictured above.”

* * * * *

COLUSA NATURAL OIL is credited by
other users with producing relatively as re-
markable results as above pictured in relieving
irritation of external ACNE—ECZEMA—
PSORIASIS—ATHLETE’S FOOT or RING-
WORM—POISON IVY— * * * VARICOSE
ULCERS—BURNS and CUTS.

THERAPEUTIC ACTION

Colusa Natural Oil acts on surface skin irri-
tations as a stimulant, increasing circulation
and thereby aiding in the healing. It has pene-
trating qualities and the reducing properties
of sulphur which helps relieve the discomfort
and pain of such conditions. Its detergent and
mild antiseptic action inhibits the spreading of
skin irritations and helps to restore the normal
skin surface. * * *

(Newspaper Mat) :

Radium is of course noted for being worth a fortune per ounce, but a strange oil from the hills in Colusa County, California, takes the prize for Petroleum values.

Although it is drilled for like ordinary wells, this oil comes in a sulphonated solution and only one gallon of oil is recovered from each 2500 to 5000 gallons of fluid pumped from the wells, which yield one to five gallons of oil per day.

* * * * *

* * * this Colusa product carries about 4% of Iodine * * * .07% Sulphur, a trace of camphor and turpentine * * * radium emanations * * *
 "Radium emanation is accepted as harmoniously in the body as is sunlight by the withering [3] plant." "The emanation is taken up in the blood and as quick as lightning, goes to all parts of the body where it kills or checks the disease germs." * * *

That said drug, when introduced and delivered for introduction in interstate commerce, as aforesaid, was then and there misbranded within the meaning of said Act of Congress, in that the statements aforesaid, regarding the efficacy of said drug in the cure, mitigation, treatment or prevention of disease in man, appearing in the circular, as aforesaid, were false and misleading, in this, that the said statements represented and suggested that said drug, when used alone or in conjunction with

Colusa Natural Oil Capsules, would be efficacious in the treatment of eezema, psoriasis, acne, ringworm, Athlete's Foot, burns, cuts, poison ivy and varicose ulcers; would act on surface skin irritations as a stimulant and would increase circulation and aid in healing; would be efficacious to relieve discomfort and pain; would be efficacious to inhibit the spreading of skin irritations and to restore the normal skin surface, and would be efficacious to kill or check disease germs; whereas, in truth and in fact, said drug, when used along or in conjunction with Colusa Natural Oil Capsules, would not be efficacious in the treatment of eezema, psoriasis, acne, ringworm, Athlete's Foot, burns, cuts, poison ivy or varicose ulcers; would not act on surface skin irritations as a stimulant, would not increase circulation, and would not aid in healing; would not be efficacious to relieve discomfort or pain; inhibit the spreading of skin irritations, or restore the normal skin surface, and would not be efficacious to kill or check disease germs; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT II.

And the said United States Attorney, in manner and form as [4] aforesaid, also gives the court here to understand and be informed that Empire Oil and Gas Corporation, a corporation organized and existing under the laws of the State of Nevada, and Chester Walker Colgrove, President and Treasurer,

said corporation trading under the fictitious name of Colusa Products Company, at Berkeley, State of California, did, within the Southern Division of the Northern Judicial District of California, and within the jurisdiction of this court, on or about the 31st day of January, in the year nineteen hundred and forty-one, then and there, in violation of the Act of Congress of June 25, 1938, known as the Federal Food, Drug, and Cosmetic Act (52 Statutes at Large, 1040; 21 U. S. C., 331 (a), 352 (a),) unlawfully introduce and deliver for introduction in interstate commerce, from Berkeley, State of California, to Mountainair, State of New Mexico, consigned to Snapp's Drug Store, a certain package containing a number of bottles, each bottle containing a drug within the meaning of Section 201 (g) (2) of said act.

Displayed upon said bottles was the following labeling:

COLUSA
NATURAL OIL
A NATURAL
UNREFINED
PETROLEUM OIL

Containing
Sulphonated
Hydrocarbons
100 Capsules (or "30 Capsules")

COLUSA
PRODUCTS CO.
WILLIAMS, CALIF.

A mild astringent to mucous membranes.

DIRECTIONS

Take one capsule three times daily.

Half hour before meals.

Enclosed in said package and accompanying said drug was a certain circular and a newspaper mat, which contained, among others, the statements more fully described in the first count of this information, which said description in said first count is, by [5] reference, hereby incorporated in this count.

That said drug, when introduced and delivered for introduction in interstate commerce, as aforesaid, was then and there misbranded within the meaning of said Act of Congress, in that the statements aforesaid, regarding the efficacy of said drug in the cure, mitigation, treatment or prevention of disease in man, appearing in the circular, as aforesaid, were false and misleading, in this, that the said statements represented and suggested that said drug, when used alone or in conjunction with Colusa Natural Oil, would be efficacious in the treatment of eczema, psoriasis, acne, ringworm, Athlete's Foot, burns, cuts, poison ivy and varicose ulcers; would act on surface skin irritations as a stimulant and would increase circulation and aid in healing; would be efficacious to relieve discomfort and pain; would be efficacious to inhibit the spreading of skin irritations and to restore the normal skin surface; and would be efficacious to kill or check disease germs, whereas, in truth and in fact, said drug,

when used alone or in conjunction with Colusa Natural Oil, would not be efficacious in the treatment of eczema, psoriasis, acne, ringworm, Athlete's Foot, burns, cuts, poison ivy or varicose ulcers; would not act on surface skin irritations as a stimulant, would not increase circulation, and would not aid in healing; would not be efficacious to relieve discomfort or pain, inhibit the spreading of skin irritations, or restore the normal skin surface, and would not be efficacious to kill or check disease germs; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT III.

And the said United States Attorney, in manner and form as aforesaid, also gives the court here to understand and be informed [6] that Empire Oil and Gas Corporation, a corporation organized and existing under the laws of the State of Nevada, and Chester Walker Colgrove, President and Treasurer, said corporation trading under the fictitious name of Colusa Products Company, at Berkeley, State of California, did, within the Southern Division of the Northern Judicial District of California, and within the jurisdiction of this court, on or about the 31st day of January, in the year nineteen hundred and forty-one, then and there, in violation of the Act of Congress of June 25, 1938, known as the Federal Food, Drug, and Cosmetic Act (52 Statutes at Large, 1040; 21 U. S. C., 331 (a), 352

(a), (b) (2),) unlawfully introduce and deliver for introduction in interstate commerce, from Berkeley, State of California, to Maountainair, State of New Mexico, consigned to Snapp's Drug Store, a certain package, containing a number of jars, each containing a drug within the meaning of Section 201 (g) (2) of said act.

Displayed upon said jars was the following labeling:

COLUSA
NATURAL OIL
HEMORRHOID OINTMENT

Contains Colusa Natural Oil, a Natural Unrefined Petroleum Oil, containing sulphonated hydrocarbons, zinc oxide, benzocain, menthol, camphor, petrolatum, lanolin, yellow beeswax. Manufactured For and Distributed By

COLUSA PRODUCTS COMPANY

Williams, California

Enclosed in said package and accompanying said drug was a certain circular, which contained, among others, the following statements:

COLUSA NATURAL OIL HEMORRHOID
OR PILES OINTMENT

For external use in relieving the discomforting irritations of HEMORRHOIDS or PILES * * *

That said drug, when introduced and delivered for introduction [7] in interstate commerce, as aforesaid, was then and there misbranded within the meaning of said Act of Congress, in that the

statements aforesaid, appearing on the jar label and in the circular, as aforesaid, regarding the efficacy of said drug in the cure, mitigation, treatment or prevention of disease in man, were false and misleading, in this, that the said statements represented and suggested that said drug would be efficacious in the treatment of hemorrhoids and piles, whereas, in truth and in fact, said drug would not be efficacious in the treatment of hemorrhoids or piles;

That said drug was further misbranded in that it was in package form and its label did not bear an accurate statement of the quantity of the contents in terms of weight or measure;

All of which was and is contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

(Signed) FRANK J. HENNESSY,
United States Attorney
For the Northern District
of California, Southern
Division.

[Endorsed]: Filed Mar. 24, 1942. [8]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 10th day of April, in the year of our Lord one thousand nine hundred and forty-two.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

MINUTE ORDER
Pleas of "Not Guilty"

This case came on this day for the arraignment of the defendants. The defendant Chester Walker Colgrove was present in Court. Walter Gleason, Esq., was present as Attorney for the defendants. Wilbur F. Mathewson, Esq., Assistant United States Attorney, was present for and on behalf of the United States. Thereupon the defendant Empire Oil and Gas Corporation, a corporation, through Chester Walker Colgrove, its President, and the defendant Chester Walker Colgrove, individually, were duly arraigned, waived the reading of the Information, and thereupon said defendant Empire Oil and Gas Corporation, a corporation, through Chester Walker Colgrove, and the defendant Chester Walker Colgrove entered pleas of "Not Guilty" to the Information, which said pleas

were ordered entered. After hearing the Attorneys, It Is Ordered that this case be and the same is hereby set for June 16, 1942, for trial. [9]

[Title of District Court and Cause.]

APPELLANTS' ENGROSSED BILL OF
EXCEPTIONS

Be it remembered: That on or about the 24th day of March, 1942, the United States Attorney, in and for the Northern District of California, Southern Division, returned in this court his information against the defendants in the above entitled cause, charging them with three counts, to-wit, the first count being a charge of violating the Act of Congress of June 25, 1938, known as the Federal Food, Drug and Cosmetic Act (52 Statutes at Large, 1040; 21 U. S. C. 331 (a), 352 (a),) by sending in interstate commerce a package containing a number of allegedly misbranded bottles of Colusa Natural Oil; the second count being a charge of violating said statute aforementioned by sending in interstate commerce an allegedly misbranded package containing a number of bottles of Colusa Natural Oil Capsules; the third count being a charge of violating said Act of Congress aforementioned by sending in [10] interstate commerce a package containing a number of jars of Colusa Natural Oil Hemorrhoid Ointment, alleged to be misbranded in that the statements appearing on the label of said

jars were alleged to be false and misleading, and also alleged to be misbranded in that said jars did not bear an accurate statement of the quantity of the contents in terms of weight or measure; that thereafter said defendants appeared in said court and were duly arraigned; and

Be it further remembered: That thereafter, and on the 10th day of April, 1942, said defendants pleaded not guilty as to each of the three counts, and the cause being at issue, the same came on for trial on Tuesday, June 23, 1942, before the Honorable Michael J. Roche, United States District Judge, the United States being represented in court by A. J. Zirpoli, Esq., Assistant United States Attorney, and the defendants being personally present and represented by Walter M. Gleason, Esq., Morgan J. Doyle, Esq., and William B. Acton, Esq., and after the due empanelling of a jury, the following proceedings were had.

Thereupon, Mr. Zirpoli made an opening statement to the jury stating what the plaintiff expected to prove, and immediately thereafter Mr. Gleason made an opening statement to the jury on behalf of said defendants. Thereupon, the plaintiff and defendants entered certain stipulations as follows:

1. That defendant, Empire Oil and Gas Corporation is a Nevada corporation, and that Chester Walker Colgrove is its president and treasurer, and that it trades under the fictitious name of Colusa Products Company of Berkeley, California.

2. That on or about January 31, 1941, defend-

ants did introduce and deliver for introduction in interstate commerce from Berkeley, California, to Mountainair, New Mexico, consigned to Snapp's Drugstore, a certain package containing a number of bottles, each bottle containing a drug, and displayed upon said bottles the [11] label which appears in the first count.

3. That if Mr. W. S. Green were called as a witness, he would testify that he is an inspector of the Federal Food and Drug Administration; that on February 13, 1941, he collected a sample from Snapp's Drugstore at Mountainair, New Mexico, of a certain drug; that he then privately sealed the sample and then transmitted the same to the Federal Food and Drug Administration, and marked 65,381-E, 2/13/41 W. S. Green.

4. That if the proprietor of Snapp's Drugstore were called as a witness he would testify that the sample referred to and marked 65,381-E was part of the shipment made on January 31, 1941 from Berkeley, California, to Mountainair, New Mexico, consigned to Snapp's Drugstore.

5. That on January 31, 1941, defendants did introduce and deliver for introduction in interstate commerce from Berkeley, California, to Mountainair, New Mexico, a certain package containing a number of bottles, each containing a drug, and that displayed was that which appears in the second count of the information and the labeling pertaining to the capsules.

6. That Inspector Green collected a sample at

Snapp's Drugstore which was part of the interstate shipment referred to and the same was numbered 65,382-E.

7. That if the proprietor of Snapp's Drugstore were called as a witness he would testify that the sample referred to and marked 65,382-E was part of said shipment and that it was transmitted by Inspector Green to the Federal Food and Drug Administration in the form received by him.

8. That on January 31, 1941, defendants did introduce and deliver for introduction in interstate commerce, from Berkeley, California, to Mountain-air, New Mexico, a certain package containing a number of jars, each jar containing a drug, and displayed upon the jars the label, "Colusa Natural Oil," being the label [12] appearing in the third count of the information; that a circular was contained therein which recites, "Colusa Natural Oil Hemorrhoid or Piles Ointment. For external use in relieving the discomforting irritations of hemorrhoids or piles."

9. That Inspector Green collected a sample at Snapp's Drugstore which was part of said interstate shipment referred to immediately hereinabove, and the same was numbered "65,383-E, 2/13/41."

10. That if the proprietor of Snapp's Drugstore were called as a witness he would testify that the sample referred to and marked 65,383-E was part of said shipment and that it was transmitted to the Federal Food and Drug Administration in the form received by him.

11. That in the large box containing this shipment there was enclosed in this instance the newspaper mat which is recited in detail in the first count.

Thereupon, the plaintiff called

ANDREW G. BUELL,

who testified as follows:

I am a chemist for the Food and Drug Administration and have been such for fifteen years; I hold a degree of Bachelor of Science in Chemical Engineering from the University of Nebraska, 1924; after graduation I worked in the United States Patent Office for about a year and a half in the Chemical Engineering Division. In 1927 I was appointed a chemist in the Food and Drug Administration.

“Q. Have you had any experience in the analysis of petroleum oil?

“A. Yes sir, in college I had two courses.”

I made an examination of the product known as Colusa Oil in February, 1941; I made complete notes of my examination which I now have with me; I received this sample, marked 65,381-E, which was then introduced in evidence and marked Government Exhibit No. 1. I found that the product was a black, viscous, tarlike oil in [13] a clear glass screw-top bottle, net 2.03 fluid ounces. I made an unsulphonated residue test and found that to be

(Testimony of Andrew G. Buell.)

30 per cent; substance volatile with steam, camphor and turpentine: none was present. Iodine compounds: none was present. Alcohol extract was a trace. Material extractable with sodium hydroxide, trace. Material extractable with water, none.

On June 17, 1942, I made an additional analysis as follows: Specific gravity .985; refractive index 1.538. Non-volatile material at 100 degrees, 96.44 per cent. Ash content .04 of 1 per cent. Solubility in water, no perceptible amount. Solubility in cold concentrated sulphuric acid 22.5 per cent. Total nitrogen .18 per cent. And I also made a boiling or distillation range. The initial boiling point was 220 degrees centigrade, and the reaction of the product to litmus was neutral.

“Q. You have given us this last chemical analysis. Will you tell us what it means now in terms of a layman. What *what* this product?

“Mr. Gleason: Just a moment. If the court please, we object to that on the ground that it is incompetent, irrelevant and immaterial. This gentleman is called as a scientist to testify as to the analytical contents of this product. He has given us those contents. They speak for themselves, and any attempt on the part of this witness to state that this is ordinary crude oil, when there are a thousand types of crude oil is, we believe, utterly incompetent.

“The Court: The objection will be overruled.

“Mr. Doyle: Exception to the ruling.

(Testimony of Andrew G. Buell.)

“The Court: Let the record note an exception.”

The witness continuing: The product is a crude petroleum oil, and the determinations I made were to substantiate this fact; this product does not contain sulphonated hydrocarbons, has no alkaline action, is not a natural alkaline oil; it is not a [14] sulphonated solution; I found no camphor or turpentine; I found .75 of 1 per cent of total sulphur.

I examined the capsules, number 65,382-E; they came to me sealed. (The bag and contents were admitted in evidence and marked Government's Exhibit No. 2.) I made a limited examination of the oil in these capsules. The contents of the capsules has the appearance of crude oil and appears to be the same as 65,381-E; the odor and taste is associated with crude oil. Another chemist from the Federal Food and Drug Administration, Maurice L. Yakowitz, made an examination with me. I also made an examination of the ointment numbered 65,383-E. I broke the seal and made an examination of the contents. I found a soft, light brown ointment in a small, blue glass, screw-top jar; net weight was .73 ounces. The zinc oxide content was 25.93 per cent; benzocaine content was .94 per cent. The volatile oils, which consist of menthol and camphor, was approximately 4.5 per cent by weight. The presence of lanolin or beeswax is indicated. My conclusion was the product is a light brown ointment consisting essentially of zinc oxide, benzocaine, camphor, menthol, crude oil, lanolin or beeswax.

(Testimony of Andrew G. Buell.)

The two jars containing the hemorrhoid ointment were then admitted in evidence as Government's Exhibit No. 3. The label of Colusa Natural Oil 65,381 with the Food and Drug seal was then admitted in evidence as Government's Exhibit No. 4. The labels on the capsules were then admitted in evidence as Government's Exhibit No. 5. The label and seal marked 65,383-E were then admitted in evidence as Government's Exhibit No. 6. The circular which is numbered 65,381-E and which was included in the shipment was admitted in evidence as Government's Exhibit No. 7.

GOVERNMENT'S EXHIBIT No. 7

65381-3-E 2/13/41

[Illegible]

This circular included in shipment



COLUSA NATURAL OIL

100% Nature's Product

Bottled just as it comes
from the ground

Nature's Home Remedy

A good customer writes—

“Every fire station and every kitchen in the land should have a supply of this oil on hand for emergency use on minor Burns and Cuts.”

COLUSA PRODUCTS CO.

Williams, California, U. S. A.

Colusa Natural Oil

Is not a patent medicine. Scientists and physicians are agreed that in the millions of years nature used in the creation of this oil, it acquired elements which explain its remarkable therapeutic quality.

According to some of the historical writings, the Indians gathered at small springs from which the oil seeped out of the ground, and worshipped with ceremony because of its great healing qualities. Its more recent fame is attested by physicians who have observed astounding results from its use and by users who have experienced remarkable benefits.

Nature has so wonderfully blended this natural alkaline oil that it is received by the human body and seems as acceptable as food or sunshine.

Guarantee Whether you buy Colusa Natural Oil for external use or the capsules for internal use or the ointment for hemorrhoids or piles, if you are not satisfied with the relief you get in one week, take the merchandise with the sales slip back to the druggist you bought it from. He is authorized by us to refund your money.

COLUSA PRODUCTS CO.

Williams, California, U. S. A.

Do You Enjoy Eating?

If not, try

Colusa Natural

Oil Capsules

For Internal Use

Seven Drops of

Colusa Natural Oil

in Each Capsule

They have a mild astringent action on mucous membrane, and they have an alkalizing action. Take one capsule three times daily—preferably a half hour before meals.

Colusa Natural Oil

Hemorrhoid or Piles Ointment

For external use in relieving the
discomforting irritations of

Hemorrhoids or Piles

Put up in tubes with a tip perforated
on sides and end for rectal insertion





Before Treatment with Colusa Natural Oil
(February 28, 1940)

ECZEMA

"Colusa Natural Oil—used externally—and Colusa Natural Oil Capsules—taken internally—are the only treatments I used in clearing up this terrible condition in Twelve Days as pictured above."

(Signed) HOMER H. BAUMGARTNER
408 South Fremont, Los
Angeles

Subscribed and sworn to before me as notary
public, March 12, 1940.

(Signed) OLIVE M. BERREAU,
Notary Public

(My Commission Expires August 6, 1940.)



Twelve days after starting treatment with
Colusa Natural Oil (March 11, 1940)

COLUSA NATURAL OIL

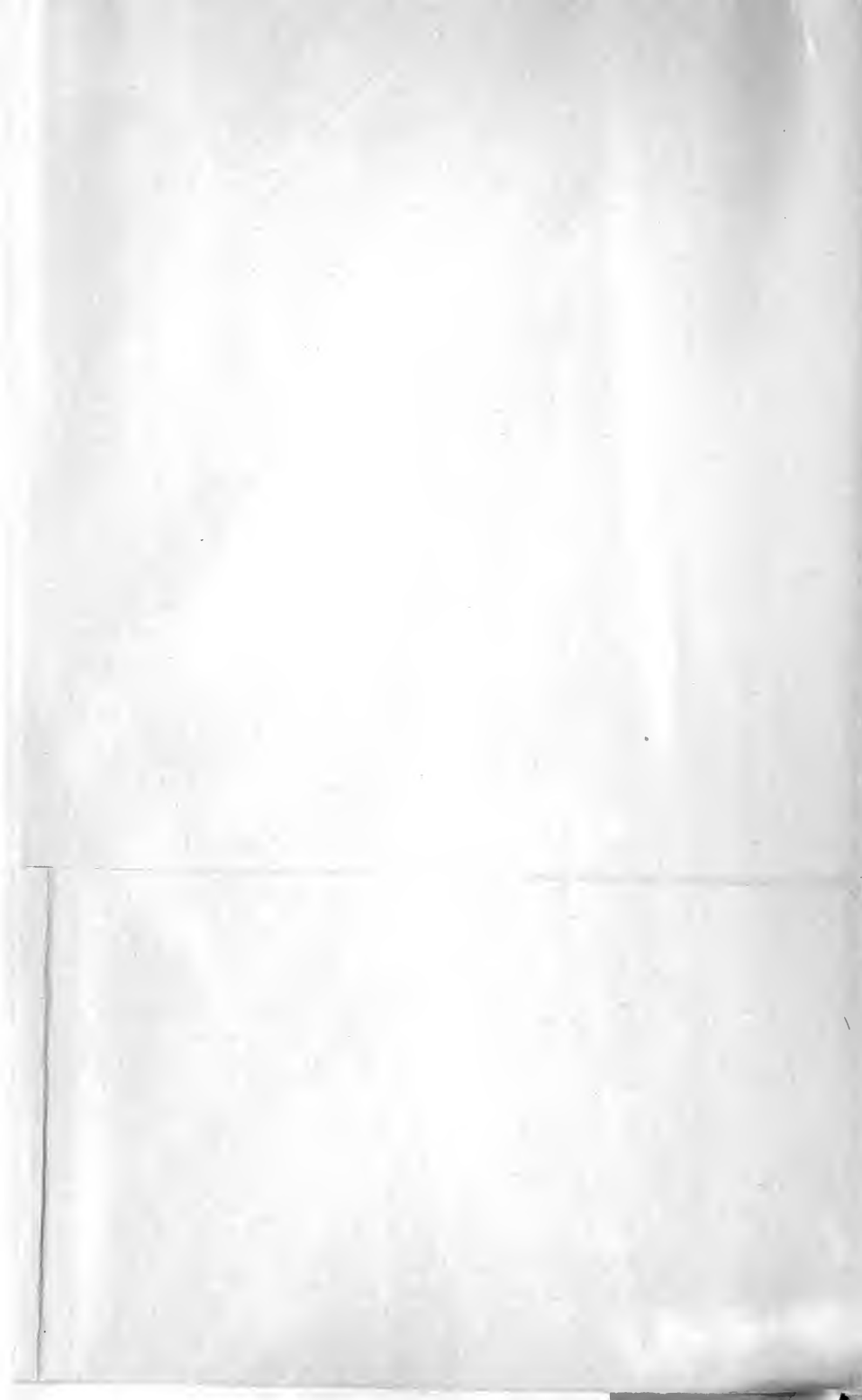
is credited by other users with producing relatively as remarkable results as above pictured in relieving irritation of external Acne - Eczema - Psoriasis Athlete's Foot or Ringworm - Poison Ivy - Chapped Hands - Sunburn - Varicose Ulcers - Burns and Cuts

Therapeutic Action

Colusa Natural Oil acts on surface skin irritations as a stimulant, increasing circulation and thereby aiding in the healing. It has penetrating qualities and the reducing properties of sulphur which helps relieve the discomfort and pain of such conditions. Its detergent and mild antiseptic action inhibits the spreading of skin irritations and helps to restore the normal skin surface. Colusa Natural

Oil does not contain any gasoline, kerosene, naphtha, asphaltum or paraffin. Warning—It Stains Linen. In using it externally a small amount goes a long way. It is a good spreader and very penetrating. Rub and Rub the Oil Thoroughly Into the Skin Two or Three Times Daily. If your skin is very tender, dilute Colusa Natural Oil one-third to one-half with olive oil.

COLUSA NATURAL OIL



Why Colusa Natural Oil Is So Costly to Produce!



Well No. 1 Showing Pumping Pier Above Flood Water.



Colusa Natural Oil comes in solution with water. Wells No. 1, 2 and 3, and receiving tanks, into which thousands of gallons of water are pumped for each gallon of oil recovered.



Each of the big tanks holds over 5,000 gallons but less than two gallons of oil are produced for each 5,000 gallons of water pumped into them.



Well No. 4 now down about 900 feet. Pay oil expected soon.

Why Colusa Natural Oil Is Not Expensive to Use!

Results Count—An Illustrative Case. In 1934, “Walter” worked in one of Los Angeles’ swanky clothing stores. His hands and feet became afflicted with Athlete’s Foot or Ringworm. The resulting discomfort, pain and unsightliness became so bad that he was forced to give up his position. In 1940

a friend induced him to try "Colusa Natural Oil." Six weeks later "Walter" was back at work selling on his old job and he is also doing a lot of selling of "Colusa Natural Oil." He tells why—"That oil sure helped my condition. It not only relieved the irritating, painful itching, but it helped to relieve the unsightly blemishes on my hands so I was able to go back to work."

[Endorsed]: Filed June 23, 1942.

(Testimony of Andrew G. Buell.)

The newspaper mat was then admitted in evidence as Government's Exhibit No. 8.

GOVERNMENT'S EXHIBIT NO. 8

65381-2-E 2/13/41 [Illegible]

13

**CALIFORNIA OIL
WORTH \$10,000
PER BARREL**

**FAMOUS FOR
MEDICINAL VALUES**

Radium is of course noted for being worth a fortune per ounce, but a strange oil from the hills in Colusa County, California, takes the prize for Petroleum values.

Although it is drilled for like ordinary oil wells, this oil comes in a sulphonated solution and only one gallon of oil is recovered from each 2500 to 5000 gallons of fluid pumped from the wells, which yield one to five gallons of oil per day.

It has been famous for generations in Colusa and adjoining counties in California, where people are known to have driven 150 miles and labor half a day to gather half an ounce of it where it seeped from the ground, in order to treat their ailments.

Containing no gasoline, kerosene, naptha, asphaltum or paraffine, which are common to ordinary crude oil, this Colusa product carries about 4% of Iodine, 3% "Ichthyol", .07% Sulphur, a trace of camphor and turpentine, nitrogen gas and radium emanations — but **no radium**. Science papers by eminent physicians state that, "Radium emanation is accepted as harmoniously in the body as is sunlight by the withering plant". "The emanation is taken up in the blood and as quick as lightning, goes to all parts of the body where it kills or checks the disease germs." This remarkable oil is now sold by

This newspaper mat included in package with the drugs.

(Testimony of Andrew G. Buell.)

LOOK *at this*
HAND
 ECZEMA



BEFORE — AFTER
 12 DAYS TREATMENT WITH
Colusa Natural Oil
100% NATURE'S PRODUCT
 EQUALLY REMARKABLE
 RESULTS IN CASES OF
ATHLETES FOOT • PSORIASIS
ACNE • VARICOSE ULCERS
 Because of its great healing qualities
 this rare oil is famous in California
 where only four small wells produce
 but a few gallons a day of it
ENJOY EATING AGAIN
 Colusa Natural Oil is also put up in
 Tasteless Capsules. Many users have
 written "Now Enjoy Eating Again"
 "Blessed Relief with Colusa Natural Oil
 Capsules" . . . "Marvelous Results" . Etc.
HEMORRHOID or PILES
 A wonderful Hemorrhoid or Piles Oint-
 ment is made by using 50% Colusa Oil
 Many have found one to three applica-
 tions sufficient
SOLD IN \$1 AND \$3 SIZES
 ON MONEY BACK GUARANTEE

[Endorsed]: U. S. Dist. Ct. N. D. Cal. No.
 27554-R. U. S. Ex. No. 8 Filed June 23, 1942. Wal-
 ter B. Maling, Clerk. By J. A. Schaertzer, Deputy
 Clerk.

(Testimony of Andrew G. Buell.)

This completed the direct examination of the witness, and the witness on cross examination testified: [15]

“Mr. Gleason: Q. Mr. Buell, are you a petroleum chemist?

“A. I am a food and drug chemist—food, drugs and cosmetics I work on.

“Q. Have you ever been engaged in the analysis of petroleum oils for any oil company?

“A. Not for any oil company. I analyzed petroleum oils in college.”

After my graduation from college I spent a year and a half in the patent office, and then went to work for the Food and Drug Department. I did no analyzing of petroleum oils in the patent office. My college course included the study of the hydrocarbon family. I don't recall ever before analyzing a product exactly like this before. By crude oil I mean an oil as it is pumped from the ground or emitted from the ground. I know there are many varieties of crude oil and I agree that the hydrocarbon family is a very complicated family. The formula for ordinary alcohol is C_2H_5OH . That same formula in an empirical way is used to express other hydrocarbons.

I am also familiar with $C_6H_{12}O_6$ which possibly stands for sixty-four different varieties of compounds found in petroleum oil. I know what fractional distillation is. It is separating crude oil into

(Testimony of Andrew G. Buell.)

various components. These components are known as fractions. I know it takes several months of analysis to accomplish the determination of their constituent parts. I know what ichthyol is. It is prepared by distilling shale which contains a large proportion of unsaturated hydrocarbons. These are then treated with concentrated sulphuric acid. They are then neutralized with ammonia and this product is known as ichthyol. Ichthyol in its natural form is sulphonated. I know that ichthyol has been used in Austria for over a century for medicinal purposes. Ichthyol is not found in a natural state; it is manufactured by treating the distillate of shale with sulphuric acid. [16]

I tested the samples submitted to me to determine if ichthyol was present. The same formula used to determine the presence of ichthyol is used to determine sulphonated oil. Turning to my notes, I made my first test on February 18, 1941. That test was made in the Food and Drug Laboratory, 512 Federal Building, San Francisco. This took approximately two days; not two continuous days, over two days.

I received the sample on February 18th and submitted my report on the 19th. I received the sample from the chief chemist and I examined the contents and made a net contents examination; I examined as to oiliness and color; I tasted it; the next step was to get the unsulphonated residue by this method. Five cubic centimeters of the oil was pip-

(Testimony of Andrew G. Buell.)

etted into a Babcock bottle and 20 CC's of sulphonated mixture, which consists of concentrated sulphuric acid in which sulphur trioxide is dissolved, and this allowed to work, and then it is heated up to 60 degrees for a period of five minutes, and then the contents are centrifuged for a period of 10 to 15 minutes, and then the volume of the oil that does not go into solution in the acid is read off, and from that value the percentage of unsulphonated residue is calculated. That test was to determine whether it was a crude oil or not. The purpose of the test was to determine whether or not this Colusa Oil was a crude oil and that was not a test for sulphonation.

I also tested for sulphonation and for ichthyol. I cannot tell from my notes whether this was done on the 18th or 19th.

"A. The first examination for ichthyol was to take a sample of the oil and put it in a separatory funnel and add water to it, and shake it for a considerable period of time, about ten or fifteen minutes; allow the layers to separate and see if there was any of the colored sulphonated products in the water layer. And this test showed that the water did not extract any colored compounds; therefore, there was no sulphonated material present." [17]

"A. An oil that is sulphonated will turn—the sulphonated oil will be colored and will be water-soluble; therefore, it will be extracted from the oil phase into the water phase, making the water

(Testimony of Andrew G. Buell.)

colored black or brown, depending on the amount of sulphonated compounds present."

I tested for camphor by the steam distillation of the original oil. There was no odor or no indication of any camphor or turpentine. I just made the notation on the analytical sheet that the steam distillation—"steam distillation content only kerosene." That is all the notes on that particular test.

I also tested for turpentine by steam distillation and, as the distillation progressed, the odor of the distillate was constantly observed and no indication of turpentine was apparent. I relied on my sense of smell entirely; that is the most reliable test.

"Mr. Doyle: We will ask to strike the last assertion or voluntary statement of the witness as having no foundation on the part of this witness, at any rate, as to whether this is the most reliable test or not, the sense of smell, for a chemist.

"The Court: Keep in mind he is a chemist.

"Mr. Doyle: Yes, your Honor.

"The Court: He says clearly that is the best method of ascertaining.

"Mr. Doyle: We will take the ruling.

"The Court: Let the question and answer stand.

"Mr. Doyle: Exception, if your Honor please.

"Mr. Gleason: Q. Did you use the same method for determining the presence of camphor, that is, by simply smelling it? (The witness) A. Yes, sir."

The cross examination of the witness was then

(Testimony of Andrew G. Buell.)

concluded and on redirect examination he further testified: [18]

There was no ichthyol present; I found no sulphonated hydrocarbons present. Camphor does not occur in crude petroleum. I tested for astringent qualities by putting some in my mouth and it had no astringent effect at all.

“Mr. Zirpoli: You gave us one bottle, which is bottle No. 1 here in evidence, and which was the bottle used by you for examination. I now show you a seal and ask you if that is your signature on that. A. It is, sir.

“Q. And that is sample No. 65,381-E?

“A. Yes, sir.”

As soon as the sample came, I sealed it and transmitted the sample to Washington for further tests.

The seal was then marked for identification as Government's Exhibit No. 9 for identification.

The Government then called

MORRIS L. YAKOWITZ

as a witness who, being sworn, testified as follows:

I am a chemist with the United States Food and Drug Administration. I have the degree of Bachelor of Science and Chemistry from Johns Hopkins University in 1931; I have taken various courses at the University of California since that time.

(Testimony of Morris L. Yakowitz.)

Since graduation, I have been continuously employed by the Food and Drug Administration. I worked seven months for the City Health Department of Baltimore. I have written several publications on drug analysis which have appeared in various chemical journals. I am a member of the American Chemical Society and of the association of Official Agriculture Chemists. I supervised the work of Mr. Buell, the witness who preceded me on the stand, that is, the work he did towards the end of his examination of the samples, which dealt with tests for unsulphonated portions; that was of the oil and ointment. I also made an examination of the oil in the capsules.

A sulphonated hydrocarbon would be a hydrocarbon molecule containing sulphur which is in the form of the sulphonic acid [19] grouping. There is sulphur present in the oil, but it is not present in the form of the sulphonic acid grouping.

I made an examination of the capsules and found they consisted of small, round, one-piece gelatin capsules containing a black, opaque, viscous oil; the oil has a distinctive odor suggesting that of a crude petroleum oil; each capsule contained 3.06 grains of oil, which amounts to 3 or 4 drops. The oil is a mineral oil and is not saponifiable, or is not a soap-forming oil like olive oil. The oil is entirely water insoluble. If it were a sulphonated hydrocarbon, any part of it would be soluble in water. I also determined that the oil does not contain any iodine

(Testimony of Morris L. Yakowitz.)

compounds, nor camphor, nor turpentine, nor phenol, and no sulphonated compounds. I determined it was a mineral oil. I also determined it is neither alkaline or acidic.

Thereupon, the witness was cross examined by Mr. Gleason, and testified further as follows:

The process of sulphonation would consist in treating a material such as a hydrocarbon with strong sulphuric acid so that the sulphuric acid reacted with the material such as a hydrocarbon to form a molecule in which the sulphur was contained in the form of the sulphonic acid grouping. I have had occasion to test petroleum oils for sulphonation.

My work is primarily in the field of drug chemistry and there is medicinal petroleum oil. I have read of ichthyol which is generally understood to mean the ammonium salt of a sulphonated product obtained by sulphonating the distillate of shale.

“Mr. Gleason: Q. Ichthyol is obtained by dry distillation of bituminous matter obtained from the fossils of fish, is that it?

“A. That is the starting material, but the process as you have described it is not yet complete.

“Q. I understand that. I am trying to get the process. You start with a material, do you not?

“A. Yes, sir. [20]

“Q. What is the material you start with?

“A. Well, as understood originally, it was a particular bed of shale occurring in Austria, but at

(Testimony of Morris L. Yakowitz.)

the present time other shales are used, as I understand it, for making ichthyol.

“Q. This particular bed of shale which is referred to as Austrian ichthyol, that was made of shale containing the remains of fish, was it not?

“A. I think that is the common understanding, yes.”

I believe the distillate is treated with a strong sulphuric acid so that a reaction occurs in which sulphuric acid grouping enters into a reaction with the hydrocarbon to give the sulphonic acid. That is then neutralized with ammonium and the resulting product is known as ichthyol.

“Q. Now, sir, is it your statement as a chemist, as an expert for the Government, that there are no naturally sulphonated hydrocarbons?

A. That is a very general statement. I would be willing to say that the particular sample of oil I examined did not contain any such material, and from my reading of the literature in this particular field it is not generally believed that petroleum oils contain any sulphonated hydrocarbons.

Q. As an expert, with your knowledge of chemistry, is it your testimony that, knowing the hydrocarbon family as you do, and knowing the sulphonation process, that nature could not sulphonate any petroleum oil?

A. That is why I qualified my statement. I believe that possibly samples might be found of such an oil, but all I know is from my reading of the

(Testimony of Morris L. Yakowitz.)

literature no one has found such an oil, and the particular sample I analyzed did not contain any such material.

Q. You have not engaged, of course, in the business of analyzing petroleum oils for the petroleum industry? A. No, sir.

Q. On how many occasions in your work in the Pure Food and Drug Bureau have you had occasion to analyze crude oil, and by 'crude oil' we mean, of course, any natural petroleum oil? [21]

A. Well, to the best of my recollection, I have never had a sample which was identical with this particular one. However, I have often on occasions isolated a petroleum oil or so-called mineral oil from other preparations that have come into the laboratory.

Q. You mean from drug preparations that have already been manufactured?

A. I would presume so, although I believe we have had severally naturally occurring preparations of that kind.

Q. Have you ever, in the course of your work—I have forgotten the number of years—taken crude oils, petroleum oils, from the ground and analyzed them for these purposes? If so, give us the case.

A. No, sir, I have never done it.

Mr. Gleason: That is all."

The witness further testified on re-direct examination:

Shale is largely an organic deposit. The common

(Testimony of Morris L. Yakowitz.)

ichthyol we have spoken of here is a manufactured product. The sample I examined contained sulphur but not in the form of sulphur dioxide. I did not make a quantitative determination of the amount. The medicinal white oils are the ones from which impurities have been removed. This oil which I examined is one from which those impurities had not been removed, that is from a refiner's point of view.

The witness further testified on re-cross examination: The Standard Oil Company manufactures a medicinal oil for the Squibb Company. They treat it with sulphuric acid to remove the impurities and obtain a water-white, odorless and tasteless oil.

"Q. Counsel asked you as to whether or not you found sulphur dioxide present. In testing for sulphonation after the process has been completed you would not expect to find sulphur dioxide present, would you?

A. Probably not. That is, in the process of making ichthyol, I presume there is no sulphur dioxide left in the material." [22]

This shale out of which ichthyol is made undoubtedly contains hydrocarbons. Yes, the hydrocarbon family is a very populous family, with a great many complex and compound members. Yes, the distillation process I used is roughly the same type of distillation treatment that is used in the fractional distillation of petroleum. The process of fractional

(Testimony of Morris L. Yakowitz.)

distillation as used in the oil refineries consists in taking some crude oil and subjecting it to heat and pressure and then taking the volatile elements off and condensing it. In this fractionation these various fractions that come off in the form of volatile elements are quite complicated.

“Q. Gasoline has quite a lengthy formula, has it not?

“A. Well, it is a mixture.

“A. Without taking too much time in details——

“Mr. Zrpoli: I can't see the relevancy of gasoline in the issue involved here.

“Mr. Gleason: Counsel, if you want to know about it, the relevancy is simply this: that out of a given crude oil there are hundreds of different compounds that are produced by this fractional process and they can't be produced in two hours' time or two days' time.

“Mr. Zirpoli: I recognize that and we all know it.

“Mr. Gleason: I think that is all.”

The next witness called by the Government was

DR. ANNA E. MIX

who testified as follows:

I reside in Baltimore, and am a chemist for the Food and Drug Administration in Washington; I

(Testimony of Dr. Anna E. Mix.)

am a graduate of George Washington University with the degree of Doctor of Pharmacy. After graduation I did work on chemistry, physics, bacteriology, preventive medicine. I have been employed by the Food and Drug Administration since 1918. My duties are to examine all sorts of chemicals for very small amounts of impurities, and to determine [23] radioactivity in foods and drugs, and I have made hundreds of such determinations. I examined a bottle of Colusa Oil to determine whether there was any evidence of radio emanations or radioactivity but found none. After my examination, I sealed the bottle and sent it to Mr. Buell in San Francisco. The seal was then marked as Government's Exhibit No. 10 for identification.

The witness further testified on cross examination:

We have one of the most sensitive machines or instruments for the determination of radioactivity, the Geiger-Mueller Counter. The sample is placed nearby, and as the radium or the emanations from the radium are given out through a package, these rays penetrate and are thrown out. The nearest I can explain in a lay manner is to compare it with handfuls of atoms thrown out into the open, and as these atoms strike this counter, they are recorded on a volt meter, or the position at which the needle on the volt meter stands for every fifteen seconds. Yes, that method of testing is essentially an electrical process.

(Testimony of Dr. Anna E. Mix.)

On re-direct examination, the witness further testified that the test applied was the recognized Government test, and is the more sensitive test.

On re-cross examination, the witness further testified:

Radio emanations is a decay of radium. The radium lasts but it is giving off rays which travel at great speeds, and as these rays are given off, they are recorded on these delicate instruments. These are atoms and are electrical. Radium is atom-carrying; electricity is atom-carrying. The atom is a component part of a molecule; the atom has a nucleus and around that are groups of ions.

Those radium emanations are magnified by a great force of direct current in the machine we use, and that is then recorded on the volt meter; we take a weak emanation and build it up so it will affect the volt meter. [24]

“Mr. Gleason: Q. Are there any other minerals, any other substances, in nature that emit radium emanations? A. No.

Q. None whatsoever? A. No.

Q. Simply and only pure radium?

A. Well, no, not pure radium; radium in ore, radium in the form of carnotite, radium in the form of uranium—so long as your radium is there, it will emit your decayed products.

Q. And that occurs in many different types of ores, rocks, does it not? A. That is right.

Q. It comes from the ground?

(Testimony of Dr. Anna E. Mix.)

A. Well, yes, it comes from the grounds."

"Mr. Zirpoli: Q. These emanations that you get from these ores that you just spoke about were not present in this oil, were they?

A. No, sir."

MARY SMITH

was then called as a witness by the Government and testified as follows:

I am an associate in bacteriology at the University of California Medical School; in 1938 I received my A. B. degree from Mount Holyoke College. I then had two years of research at Columbia University in the field of bacteriology and endocrinology; after that I had a year of graduate work at Harvard Medical School in bacteriology. At the University of California I have been working on germicides and disinfectants; I am employed at the University as a bacteriologist. I examined an oil known as Colusa Oil. The bottle was then admitted in evidence as Government Exhibit No. 11. I made tests of the oil to determine its germicidal, antiseptic and inhibitory properties, making about forty altogether. I did not find any germicidal, antiseptic or any inhibitory properties.

On cross examination the witness testified:

I was testing the product to see if it would kill germs; I did not submit it to any clinical tests, only laboratory tests, [25] the standard tests used by

(Testimony of Mary Smith.)

the Food and Drug Administration of materials claimed to be antiseptic or germicidal. In one of the tests we would take a twenty-four hour culture of an organism, specifically staphylococcus aureus. (Here the witness described in detail the method of preparing this culture). We take a drop of the material to be tested and place it on the plate. If the material shows any germicidal or antiseptic properties, there will be a small or large clear ring around the material where the organisms have not grown. The plate is cloudy where the organisms have grown. You can see the individual colonies. With this material there was no clearing at all. The organisms could be seen growing, both in the material, the oil, and underneath it. Yes, the culture is the equivalent of the germ and we attempt to inhibit its growth or kill the growth. There are innumerable types of cultures; they could be counted in the millions. Out of these we used only two different organisms; they have been established as the best organisms through many years: one staphylococcus aureus, because it is an organism that has a standard resistance as determined by standard tests of resistance to phenol. Yes, there are many organisms that are more resistant to germicidal action.

I know nothing about psoriasis, having never studied the nature of it. No, I am not a pharmaceutical chemist, but I have tested disinfectants as a bacteriologist. No, I have not, as a pharmacist,

(Testimony of Mary Smith.)

studied pharmaceutical chemistry for the purpose of studying the germ-killing properties of a chemical. An antiseptic is considered to be an agent which will prevent the growth of organisms. Inhibitory means either to slow down or completely prevent, completely stop the growth of organisms. Germicidal means the power of the agent to kill the germs.

“Q. See if I understand your definition. If I had an organism, a bad case of psoriasis, and placed a preparation on my [26] hand which had the effect of stopping the growth of that and removing it, would that be antiseptic?

A. Yes; if it removed it, it killed the organism, it also would be germicidal.

Q. Now, the phrase or word ‘inhibitory.’

A. Yes.

Q. What do you mean by that?

A. ‘Inhibitory’ would mean here either to slow down or completely prevent, completely stop the growth of organisms.

Q. That is, the spreading of the growth and the multiplication——

A. The organisms might be living, but they would be——

Q. Held in check?

A. That is right.

Q. By ‘germicidal’, of course, you mean the power of the agent in question to kill the germs?

A. That is right.

(Testimony of Mary Smith.)

Mr. Gleason: That is all."

The witness further testified on re-direct examination:

The staphylococcus aureus is the ordinary, common pus-forming organism. We made several tests. Some of the tests are more to test the germicidal action and others are to test inhibitory action. They were all negative. As a result of these tests, I found they had none of the three properties previously mentioned.

NICHOLAS C. LEONE

was then called as a witness by the Government and testified as follows:

I am an inspector for the Food and Drug Administration. I hold a Ph.D. degree from the University of California and a Certified Public Health Officer from Harvard University. I have had occasion to make tests of various products to determine their germicidal activities. I participated in the tests with Miss Smith, a previous witness. I found that this Colusa Oil has no germicidal properties nor did it have any antiseptic or inhibitory properties.

On cross examination, the witness further testified:

My tests were the same that Miss Smith made; I collaborated with her. The tests we made were

(Testimony of Nicholas C. Leone.)

to determine if this product would kill germs. We used two organisms. [27]

On re-direct examination, the witness further testified:

The two organisms were the common pus germ and the typhoid organism.

“Mr. Zirpoli: Q. Why did you take these two?

A. Because both of those organisms are the standard or official organisms used in germicidal and antiseptic tests.

“Mr. Zirpoli: That is all.

“Mr. Doyle: Q. That is to say, by the Public Health Bureau; they are the germs that the Public Health Bureau uses in tests.

A. Yes, they are.

“Mr. Zirpoli: Q. From your general knowledge, including your university training and background, are these not the germs that are used for those tests?

“Mr. Doyle: I object to that; there is no foundation laid; he may have had a college education and not know much about what germs other people use.

“Mr. Zirpoli: I am asking from his background and experience in connection with his training and his statements. I will strike the question.

Q. From your experience and your training and your knowledge in your profession, in your opinion is the test that you applied a usual, standard test applied by the profession generally?

(Testimony of Nicholas C. Leone.)

A. It is.

“Mr. Doyle: Just a second, Mr. Witness, if you please, no proper foundation laid.

“The Court: Read the question, Mr. Reporter.
(Question read.)

“The Court: He may answer. The objection will be overruled.

“Mr. Doyle: If your Honor please, we don’t want to be contentious. We think there has been no testimony from this witness as to any training in school or otherwise to determine in the matter of testing germicide. [28]

“Mr. Zirpoli: He told us that he is a graduate of the University of California.

“Mr. Doyle: I might, be, too.

“Mr. Zirpoli: Q. What was your training? What degrees? What studies did you have?

A. I graduated from the University of California College of Pharmacy. Considerable work was in the field of pharmacy and bacteriology. I took two years—two and one-half—postgraduate work at the University of California to major in bacteriology.

Q. How many tests have you made to determine germicidal activities?

A. In excess of a hundred.

Q. From your experience and your knowledge and your training in your profession, in your opinion, were the tests made by you the usual standard tests made by the profession of bacteriologists?

(Testimony of Nicholas C. Leone.)

A. Yes, they are.

“Mr. Doyle: Just a second. Object to that question upon the ground there is still no foundation laid. He testified to what he did when he was at California, but this question calls for an answer from the witness as to what they do in New York and Philadelphia in all sorts of institutions other than the particular school he was in here and other than the particular outfit he now works with. We submit there is no foundation laid; it is just guesswork on the part of the witness.

“Mr. Zirpoli: He testified to the general consensus of opinion.

“Mr. Doyle: It isn't even shown that he knows.

“Mr. Zirpoli: From his knowledge.

“Mr. Doyle: From his knowledge, which is assuming something.

“Mr. Zirpoli: Do you want me to go into every book that he studied, every course he took, every test that he ever made?

“Mr. Doyle: I am not particularly concerned what counsel goes into or doesn't go into. I submit there is no foundation [29] laid for this witness giving this testimony.

“The Court: The objection will be overruled.

A. Yes, it is a standard test.

“Mr. Doyle: Exception.

“Mr. Acton: Exception before the witness answered.

“The Court: Note an exception for the purpose of the record.

(Testimony of Nicholas C. Leone.)

“Mr. Zirpoli: That is all.

“Recross Examination

“Mr. Gleason: Q. One other question. Are these the tests that are used to determine whether or not a given drug will destroy or inhibit the elements that cause skin diseases?

“Mr. Zirpoli: The same objection; there has been no foundation as to what the elements that cause skin diseases are.

“Mr. Gleason: I submit, if your Honor please, that the witness is here testifying in connection with psoriasis, acne and the various items mentioned in this indictment or this information.

“Mr. Zirpoli: I beg to differ with counsel.

“Mr. Gleason: The purpose of this testimony is to show that this particular product does not have any efficacious use in the treatment of those diseases. That is the issue in this case. As a matter of fact, those diseases do not involve germs. This is a test for typhoid. We want to see if this witness will testify as a scientist—and I believe he will not—that those are the tests—he has had this long training and this long background. We want to see if he will testify that those are the tests used by scientists to determine the antiseptic, inhibitory or killing powers with respect to skin diseases.

“Mr. Zirpoli: We haven't had any evidence in this trial yet as to what skin diseases. The Government has the witnesses, and will submit them, on that particular subject. The issue in so far as

(Testimony of Nicholas C. Leone.)

this witness is concerned is not with relation to those [30] diseases. There is a claim that it is germicidal, and he is testifying solely as to whether or not it will kill germs.

“Mr. Doyle: Typhoid germs.

“Mr. Zirpoli: Typhoid and the common pus germ that he has testified about.

“Mr. Doyle: That is all.

“Mr. Zirpoli: Yes, I agree that that is all he testified about.

“Mr. Gleason: Any further questions?

“Mr. Zirpoli: No.”

DR. MAURICE K. TAINTER

was then called as a witness by the Government and testified as follows:

I am a professor of pharmacology at Stanford Medical School and College of Physicians and Surgeons Dental School; pharmacology is the subject dealing with drugs and medicines and their application to the treatment or cure of disease; it can be expanded to include research, investigation of drugs, development of new drugs, the study of toxic effect of them, the treatment of poisoning and various related subjects of that sort. A pharmacist is the man who prepares the drugs to be handed out to the patient. The pharmacologist is the man who, in the medical school or in research laboratories,

(Testimony of Dr. Maurice K. Tainter.)

develops those drugs and learns how they should be used and what their actions are. I am a physician and surgeon. I graduated from Stanford University Medical School in 1925. I am a member of all local, national and international societies relating to my profession. I have published a great many articles dealing with the new drugs and their uses, both here and abroad. I am familiar with petroleum oils as a pharmacologist; that is one of the compounds concerning which I teach medical students and doctors the proper use of drugs. I examined a sample of Colusa Oil. This is the sample. (This was then admitted in evidence as Government Exhibit No. 13.) The tests are quite simple to make. [31] It is not an astringent. I found no iodine—at least not within the limits of the sensitivity of the tests employed. I made a test to determine whether it had a radioactivity and found it had absolutely no radioactivity. I also found instead of being detergent and cleansing, it was a rather dirtifying material, a thing which would make you dirty and difficult to clean.

I rubbed some on my own skin and found no evidence that it was irritating, or produced any hyperemia or reddening of the skin. I found no camphor or menthol or other volatile oils in the material as judged by the test of smelling. I could smell no turpentine. We found no evidence of any kind of radioactivity, including radio emanations. This test is made by using what is known as a Gei-

(Testimony of Dr. Maurice K. Tainter.)

ger Counter, an apparatus which is about like the loud-speaker of a radio set, with a tube through which radium emanations come. This is a very sensitive apparatus. Then to see how sensitive the apparatus was, and to prove it was working properly, we took an ordinary wristwatch with a luminous dial, and when I held that an inch or two from the apparatus it made such a terrific noise, the static almost drove me out of the room. So I had to back off a ways. When I held it a distance of four inches from the apparatus, it gave out a noise of about three or four times the base noise of the cosmic rays. So this material, therefore, does not even have the small fraction of radioactivity that is present in the luminous dial of a wristwatch.

“Mr. Zirpoli: Q. Is there any additional value in wearing a wristwatch with a luminous dial, in your opinion as a medical man and pharmacologist, as a man who applies medicines and oils to the skin and to the person?

“Mr. Gleason: We object to that, if the court please, on the ground that it is incompetent, irrelevant and immaterial, no proper foundation laid.

“The Court: I have allowed wide latitude on this testimony. [32] He may answer. Objection overruled.

“Mr. Doyle: Exception.

“A. No. Wearing a wristwatch which has a luminous dial does not give rise to enough radium emanations to have any therapeutic value.

(Testimony of Dr. Maurice K. Tainter.)

“Mr. Zirpoli: Q. Doctor, from your examination of this product, was it any different, from your own experience, from ordinary crude petroleum oil?

“Mr. Gleason: Just a moment. If the court please, we object to that on the ground that it is incompetent, irrelevant and immaterial; that no proper foundation has been laid. And we stress this objection, if the court please, for the reason, as has already been brought out, there are thousands of different types of crude oils with thousands of different constituents, and for a blanket assertion to be made of this type is utterly unfair. If the court please, we submit this: If the doctor wants to testify as to the crude oils that he has had experience with, he should give us the formulas and the designations, paraffine, asphalt or otherwise, and then compare this oil with them. Then we have some facts.

“The Court: The court is prepared to rule. If the witness knows he may answer. The objection may be overruled.

“Mr. Acton: Will your Honor allow us an exception before the answer?

“The Court: Note an exception.

“A. Well, because there are many varieties of oils, the material was different, of course, from a considerable number of them. However, it had no distinctive properties in the sense that it smelled like ichthyol or materials which you would recog-

(Testimony of Dr. Maurice K. Tainter.)

nize as having medicinal power, so that as far as I could make out, it was the commonest kind of crude oil in the sense that it had no special properties that were distinctive or characteristic." [33]

This oil had no alkalizing action nor is it an acid. It is neutral; it is in between the two. I have read Government Exhibit No. 7 in evidence; also Exhibit No. 8. This oil has no healing qualities. The oil in the capsules would not be an effective or useful treatment for eczema or acne.

This oil taken internally or applied externally would not be efficacious in the treatment of psoriasis; applied externally, or taken internally, it would not be efficacious in the treatment of athlete's foot, nor efficacious in poison ivy attacks or in the treatment of varicose ulcers. It would be undesirable for burns and should not be used on cuts; it would not act as a skin stimulant nor would it increase the circulation of the blood. The oil is not a detergent and I found no antiseptic ingredient. It might protect the skin against wind and chapping but it would not restore the skin surface.

The statement that "the emanation is taken up in the blood and as quick as lightning, goes to all parts of the body where it kills or checks the disease germs" is not true. Any amount of radiation which would be sufficient to kill disease germs will be enough to kill the body. The tissues of the body are more sensitive to radiation than are the germs.

Speaking in very general terms, there are two

(Testimony of Dr. Maurice K. Tainter.)

groups of sulphonated preparations of oils, solutions, one of which are the naturally occurring sulphonated preparations which we have known for hundreds of years, ichthyol, which contains organic sulphur, and they smell kind of like fish—decomposed fish—and those have been used as medicinal products for a long while. Then recently, within the last twenty years, there have been derived sulphonated products by chemical reactions. A good example of that is the irium in Pepsodent toothpaste and Drene and Duz that are being urged to use in your kitchen and dishwashing or as shampoos. Those are sulphonated compounds made by chemical [34] reaction. Those are the two general types: one the natural and the other the synthetic.

The salve or ointment would not be a competent or good treatment for hemorrhoids. It might be palliative in relieving itching; it might help the itching temporarily, but would not cure the condition. The benzocaine would relieve the itching.

“Mr. Zirpoli: Q. In this product we have .91 per cent of benzocaine, less than one per cent. Is there enough benzocaine there to be efficacious in the treatment of hemorrhoids, in your opinion?

“Mr. Doyle: If your Honor, please, we object to the question upon the ground that it has been asked and answered. The previous answers given by this witness were upon the basis of this formula given to him by counsel. He has testified that he

(Testimony of Dr. Maurice K. Tainter.)

thought it would be beneficial and this is obviously an attempt, conscious or unconscious, to impeach his own witness.

"The Court: Objection overruled. He may answer.

"Mr. Acton: May we note an exception before the witness answers?

"The Court: Note an exception.

"A. .9 of one per cent is not enough benzocaine for a good anesthetic action. It takes about ten per cent of benzocaine to produce a good degree of anesthesia, and one per cent, or .9 of one per cent, which is slightly less, is down to almost the minimum of effective concentration. I would say that the action at that concentration would be very small, but still might be present to a moderate degree."

Thereupon the court adjourned until the following day, June 24, 1942.

Acne is a skin disease caused by bacterial infection of the skin. This oil would have no action on this infectious process going on below the surface of the skin. [35]

Poison Ivy is a burning of the skin by means of an oil secreted by the poison ivy or poison oak plants. The oil gets on the skin from contact with the plants out in nature, in the fields or in the woods, and then produces itching and burning and blistering, depending on the degree of the contact that occurs.

(Testimony of Dr. Maurice K. Tainter.)

“Mr. Zirpoli: What is the effect of the application of oil such as the oil here on the skin?

“Mr. Gleason: We object, if the court please, that no foundation has been laid. We would like to have the doctor state whether or not he ever applied the oil to such a condition. Have you ever applied that oil to a condition of poison oak?

“Mr. Zirpoli: I can cite innumerable cases under the Federal Food and Drug Act, your Honor, which provide that when a man who is a scientist particularly learned in a particular field takes the stand, he is competent to testify about those matters for which he is specifically trained by reason of his learning and his instruction and his scientific training; and furthermore, there are innumerable cases that say that the particular doctor need not even have applied the particular product involved or have used or seen it if he knows its constituent, component parts and has been given the necessary foundation therefor. And that has been done, because we have told the doctor what this stuff consists of, and the doctor himself has seen it, and from his scientific medical knowledge he can give his opinion as to what the effect would be.

“Mr. Gleason: If the Court please, we doubt very seriously whether counsel can produce any case covering testimony of this type. We would like to ask one question, if we may, for foundational purposes, and that question will be whether or not the

(Testimony of Dr. Maurice K. Tainter.)

doctor has ever applied oil of this type to that kind of a disease.

“The Court: The Court is prepared to rule.

“Mr. Zirpoli: That is cross examination. [36]

“The Court: The Court is prepared to rule. You may develop that on cross examination. The objection will be overruled.

“Mr. Acton: Will your Honor allow us an exception?

“The Court: Yes.”

I have applied oils to poison oak. This oil would have no curative effect at all. It would have solely the action, the palliative action of gaining time, allowing you to stall, if you want, until after the condition had cured itself. It is not a cure for poison ivy or poison oak.

Acne is very commonly found in people whose skin is very greasy or oily, but I don't know whether you would say it is an oily disease. Get the oil and grease off, and you can get better application of your other remedies.

“Mr. Zirpoli: Isn't that true also of poison ivy?

“Mr. Gleason: We object, if the Court please, on the ground that the question is obviously leading.

“The Court: Objection overruled.

“Mr. Acton: Note an exception.”

The treatment for poison ivy—the first treatment is to wash the skin with the strongest soap you can get. It removes all the fat and grease from the

(Testimony of Dr. Maurice K. Tainter.)

skin, so the first therapy you apply is to degrease the skin rather than oil or grease it up with some extraneous material.

Yes, Ichthyol is a derivative of crude oils coming from certain special deposits in various parts of the world. Ichthyol as used medically is not crude oil out of the ground. It has to be purified and concentrated. Sulphuric acid is used for the purpose of purifying it. No, the chemical process is not for the purpose of sulphonating the oil. The oil is already sulphonated before, but it is for the purpose of purifying it, freeing it from some of the other materials that may be with it.

“A. Sulphonation involves the combination of sulphur in a [37] special organic form—special chemical combination. It differs from the formation of sulphides, which have the smell of rotten eggs. Sulphonation is a combination of sulphur with oxygen and usually with organic material derived from the breakdown of animal matter. In ichthyol it is presumed by the geologists—I am not an expert in geology, but I know this as a matter of general knowledge—that they think the sulphonation of this oil comes from the oil coming from the bodies of fish and other animals of that sort which have been deposited in the strata from which this oil arises.”

Thereupon, the witness testified on cross examination:

No, I have never practiced dermatology. Derma-

(Testimony of Dr. Maurice K. Tainter.)

tology is the treatment of diseases of the skin, including psoriasis, eczema, acne, athlete's foot and the other diseases mentioned in the information. I have not attempted to apply this oil in any clinical tests. I made one animal test. I used a rabbit and dropped it in its eye to see if the material is irritating, that is, if it causes redness or burning and swelling of the eye. I dropped this in the eye of four rabbits and observed their eyes for six or seven hours during the day, and again the next day. By comparing the eye with that Colusa Oil in it on one side, and the other eye which had no oil, I find no evidence that this material produced any irritation of the delicate membranes of the eye, and therefore concluded that it has no irritating properties. I also rubbed it on my own skin and saw no evidence of irritation.

My opinion is that if you placed this oil upon the skin and it did not cause a reddening, then it was not an irritant or stimulant. Yes, I have used ichthyol and it only causes redness in a very mild degree. The redness produced is more the result of rubbing the skin than the ichthyol itself. Yes, ichthyol has been used for over a century as a theurapeutic agent, but it was dropped from the Pharmacopoeia because it had been decided that the [38] compound was without value. It had been found, as a result of more modern knowledge, the material was not useful or valuable enough to even

(Testimony of Dr. Maurice K. Tainter.)

employ a legal standard for its purity and strength.

No, I have never treated a case of psoriasis.

“Mr. Gleason: Q. That is one of the most difficult skin diseases known to the medical profession, is it not?

A. I am not qualified as a dermatologist, so I couldn't answer.

Q. Do you know of any cure, as a pharmacologist, which the medical profession has developed for psoriasis?

A. Well, I know as a pharmacologist teaching the action of drugs to medical men that I have no drug that I teach them as a cure for psoriasis.”

Yes, I believe it is true that the known treatments of the medical world for psoriasis are external. I wouldn't like to set up myself as a dermatologist, because I obviously am not one, but as far as I know, all the treatment of psoriasis is the external application of remedies.

Yes, it is true that the function of the medical profession in the treatment of disease consists of the effort to cure the disease and the effort to mitigate it or alleviate it.

I have never personally treated a case of acne or eczema. I am not qualified to answer concerning various forms of eczema. I don't think anyone knows the cause of acne other than it is an infection of the skin and ultimately the skin is apt to get into a greasy state; that does not mean acne is

(Testimony of Dr. Maurice K. Tainter.)

not found in a dry skin. There are many diseases for which we do not have the real remedy because we do not know the real causative agent. Yes, the medical profession has a great many diseases as to which it does not know the true cause.

A proprietary medicine is one in which there is a property right, where some individual or firm owns that particular medicine. An example is adrenalin; one company owns the right to the name of adrenalin, whereas the drug itself is an official drug which is [39] recognized by the legal name of epinephrin. Any manufacturer can make and sell epinephrin, but Parke-Davis & Company have protection to the name of adrenalin.

I do not know the cause of psoriasis. Acne is caused by germs getting into the skin; ordinarily the germ you will find is a staphylococcus. Constipation does not cause acne, but if a person were rendered unhealthy by constipation he may get acne or indigestion, or any one of a hundred other things. Acne is caused by a germ—any number of germs can cause acne.

No, I would not expect ordinary crude oil to alleviate such a disease as psoriasis, nor acne, nor eczema; any such oil to have effect would have to have medicinal properties I failed to find in Colusa Natural Oil. I made no effort to test this oil in clinical tests other than what I have told you.

A radium emanation is a particle of energy given

(Testimony of Dr. Maurice K. Tainter.)

off from a radioactive material, in the form of alpha, beta or gamma rays. It is a ray—not a gas. Gases may be radioactive, but radium emanation is not necessarily a gas. The Geiger Counter tests radium emanations; I can't tell you much about it; I can play my radio and I can run a Geiger Counter.

“Q. You mentioned yesterday that cosmic rays cause this machine to record impulses that are translated and amplified into sound waves.

A. Into sound; that is correct.

Q. And that you put a wristwatch with a so-called radium dial on it——

A. A luminescent dial, yes. An ordinary wristwatch, the kind that you buy to see in the dark with.

Q. When you put this wristwatch in the immediate vicinity of this mechanism, if I recall your testimony, the noise produced was almost deafening; is that right?

A. Yes, there are enough radium emanations or radioactive emanations given off by even the luminous dial of a wristwatch to make so much noise that it was unpleasant to be in the room with it when this was put right up [40] against the counter in the position where the Colusa Oil was placed.

Q. Do you know the composition of that luminous dial?

A. I have never had occasion to study it. I know

(Testimony of Dr. Maurice K. Tainter.)

it is radioactive. This machine proves it is radioactive. It gives off an emanation that you can see in the dark."

I am not a radiologist, nor do I use radium therapy any more than I treat skin diseases.

No, I have not experimented with rocks or natural minerals that have radioactivity. Radioactivity is the liberation of energy, or the sending out of energy from radioactive materials.

"Q. And your statement is that a radio wave, what we term as the radioactivity, is material, is substance?

A. That is material and substance, because it can actually produce impacts. It has pressure; it can be deviated or swung from side to side by running it through an electrical field with magnets. That is what they do in x-ray tubes.

Q. In short, it is a material substance?

A. It is a material substance, although there you are getting down to a tricky field of physics and chemistry. The physicists themselves cannot agree as to what is immaterial and what is material."

A hemorrhoid is a distended vein occurring around the rectum; like a varicose vein in which the walls are weakened so it is enlarged and bulges out and gives rise to discomfort. Some people are born with poorer walls in the blood vessels, so they are subject to heart attacks, apoplexy and strokes, as we say, because they just naturally have blood

(Testimony of Maurice K. Tainter.)

vessel walls which get weak easily and give out, just like other people have flat feet. Constipation does not cause hemorrhoids, but if a person has a weak vein wall and is constipated, that might conduce to the condition of those poor veins. Hemorrhoids are not the expression of internal diseases. [41]

DR. JAMES W. MORGAN

was then called as a witness on behalf of the Government, and testified as follows:

I am a surgeon of the rectum and colon and a specialist in that field; I am a graduate of the University of Pennsylvania, 1914; I did my interne work at Philadelphia General Hospital; I practiced fourteen years in Modesto. I did postgraduate work in New York for six months in 1930, and in London for a year in 1931. I am a member of several medical societies, including the American Proctologic Society, which is made up of reputable rectal specialists; that is the field in which I specialize. I have written articles for medical journals. My work consists in part of treatments of hemorrhoids of which there are two types, internal and external. Internal hemorrhoids in 99% of cases are due to a family weakness, while external are due to injuries, hard stools, injuries from childbirth or the use of too strong medicines or bruises. A hemorrhoid is a tumor; it contains not only a vein, but also an ar-

(Testimony of Dr. James W. Morgan.)

tery and nerves. In treating externally, soap and water is best to keep them clean; if too large, they must be removed by surgery; we treat them with palliative measures to alleviate pain and discomfort.

If camphor and menthol are used in treatment, you would have to have six to ten per cent; I would want ten per cent—at least five per cent of benzocaine; you would get no benefit with less than five. An ointment made with lanolin and beeswax containing 25.93% zinc oxide, .91 of 1 per cent of benzocaine, less than five per cent menthol and camphor, together with unrefined petroleum oil would make them dirty and irritate them; it would certainly interfere with proper hygiene; soap and water is far and away better. Such an ointment would in my opinion irritate.

The witness testified further on cross examination as follows:

No, I have not seen the ointment. I have never used it in my practice or treatment of patients. I took his word those are [42] the ingredients and my answer was upon a hypothetical basis. It is true that different people react differently to the same quantity of the same drug. This is something we anticipate. As to many patients you must determine the quantity of the drug by ascertaining from the patient what the reaction is. I have had patients advise me that the drug prescribed was ineffective and that it gave no relief. When we have to change

(Testimony of Dr. James W. Morgan.)

the medicine, we usually do not hop up the dose; it is usually the other way around, except in the case of a sedative. We usually start from what is normal, but we have found that a normal dose is an overdose for most people.

I do not recommend surgery in all rectal cases. I usually know the first time I see a patient if surgery is necessary. In other cases we try medical means rather than surgery; we try palliative measures. The most important thing is cleanliness, then the application of heat, application of anesthetic materials, rest, proper habits to avoid fatigue, and any general treatment that might be necessary. I do prescribe ointments and salves, but I am much against ointments. There are few that help as much as they interfere with proper hygiene, keep the air out and prevent proper air getting to the skin. I prefer a lotion which contains an anesthetic. Yes, the specialists in my field have varying views. The majority use more salves than I do. Most of the salves are wrong. I think one-third of all external hemorrhoids cause itching. In those cases where there is itching or burning, I prescribe medicinal preparations for application, containing an anesthetic; not always the same anesthetic; it varies. It depends upon the particular patient I am treating. However, I use the average dose and then modify it up or down.

Yes, it is true that an itching condition may be overcome or remedied by a counter irritant which

(Testimony of Dr. James W. Morgan.)

need not be an anesthetic; a counter irritant causes irritation, and that is what happens [43] when you use strong medicine around the rectum; the most delicate skin in the body is the perianal skin, and it will not stand a counter irritant that relieves itching the same as horse liniment does. I cannot think of any counter irritant that will do any good to the anus. You could use carbolic acid on a hemorrhoid and it would certainly take away the itching. We try to remove the cause of the itching, and you don't get that by counter irritants. Yes, it is true that we judge the effectiveness and efficacy of a medicine by its results upon the patient as we observe it.

The witness then testified further on re-direct examination:

I think this ointment from this jar would do more harm than good in the treatment of hemorrhoids; it might relieve temporarily some of the symptoms. Zinc oxide ointment as such is always irritating to the perianal skin and should never be used.

DR. HARRY JOHN TEMPLETON

was then called as a witness on behalf of the Government and testified as follows:

My office is in Oakland, California; my profession is dermatology and syphilology; a dermatologist

(Testimony of Dr. Harry John Templeton.)

is one who limits his practice to diseases of the skin. I am a graduate of the Ohio State University with a degree of Doctor of Medicine in 1917; University of Pennsylvania, Master of Science, 1926. I have specialized in this field for seventeen years. I am a member of a great many medical associations and have written a number of articles for scientific journals. In my work I treat such diseases as eczema, psoriasis, acne, ringworm, athlete's foot, poison oak, and in an emergency, burns.

Bearing in mind the chemical composition of this Colusa Natural Oil, I do not think it would be efficacious in the treatment of acne. For external medication you must have a minimum of three per cent sulphur, though I often use five to ten per cent, or stronger. I do think that a preparation which contains less than one per cent would not be efficacious. I do not think this [44] preparation known as Colusa Oil taken internally in capsules or applied externally would be efficacious in the treatment of acne, psoriasis, athlete's foot, ringworm, or eczema.

The application of an oily substance such as this oil would be harmful, I think, in the treatment of acne. I have had bad luck in treating acne with an oily substance; in fact, that is a condition known as oily acne produced by the external application of mineral oils. I think it would prove harmful in the treatment of poison oak. Again, we haven't had very good luck in treating poison oak by means of

(Testimony of Dr. Harry John Templeton.)

oily applications. I think it would prove harmful in the treatment of poison ivy. I don't think taking this oil in capsules would do any good in the treatment of the conditions outlined; nor do I think the oil applied externally and the taking of the pills internally in conjunction would prove efficacious.

The witness was then cross examined, and testified further, as follows:

I have never used this oil in my practice; I have made no clinical tests of the oil. Psoriasis is a very difficult disease and I know no cure for it.

DR. GEORGE V. KULCHAR

was then called as a witness on behalf of the Government, and testified as follows:

I am a physician specializing in dermatology and syphilology. I am a graduate of the Stanford University Medical School, in 1930. From 1930 to 1934, I served as instructor in the Medical School of the University of Pennsylvania, and specialized in dermatology and syphilology. Since 1934, I have been clinical instructor in these two subjects at Stanford.

Dermatology has to do with the diseases of the skin and its appendages. This has been my specialty since I left Stanford in 1930. I am a member of a number of medical associations. I engage in the

(Testimony of Dr. George V. Kulchar.)

practice of treating diseases of the skin. I am familiar [45] with eczema, psoriasis, acne, ringworm, athlete's foot and poison ivy. I treat bruises, but cuts only in an emergency. In the treatment of these diseases, I do not believe there is any medicinal value from the use of crude petroleum oil which has a sulphur content of less than one per cent; I would not use sulphur in some of the diseases you enumerated; sulphur could be used in the treatment of acne, psoriasis and eczema. To be effective, there must be at least five per cent sulphur in the compound.

Eczema comes in more than one form and the form of eczema would very definitely determine the character of the treatment or medication. You cannot have one specific medication that is good for treatment of eczema. The determination what should be used in the treatment of eczema depends upon a knowledge of the particular character of the eczema involved and that calls for a diagnosis by a skin specialist.

I am familiar with the composition of Colusa Natural Oil as recited by you. Bearing in mind its composition, as related by you, it is my opinion that the application of this oil would not be efficacious in the treatment of eczema; I think it would have a deleterious effect and an aggravating effect on acne; it would make it worse; it would not help in the treatment of poison ivy, or ringworm,

(Testimony of Dr. George V. Kulchar.)

or athlete's foot, or psoriasis. It would not be efficacious in the treatment of varicose ulcers. I do not think it would be helpful if taken internally in capsules, nor do I think the two taken in conjunction would be efficacious. In my opinion they would have no effect.

Oil is a satisfactory temporary treatment for a burn. I don't believe it would have any aggravating effect, and I don't think it would have any healing effect. This oil would not act as a stimulant on the skin, nor would it increase the circulation and aid in healing; it would not inhibit the spread of skin irritation nor restore normal skin surface. I use radium and radioactive materials. Radio emanations are not used in the treatment of skin diseases. Radio emanating materials are used to relieve itching, which they will do, and the other is to reduce skin lesions or reduce tumors by cell destruction, either the blood cells which collect under the skin or the actual tumor cells.

The statement "radium emanation is accepted as harmoniously in the body as is sunlight by the withering plant" is not true. [46] The statement, "the emanation is taken up in the blood and as quick as lightning goes to all parts of the body where it kills or checks the disease germs" is only partially true. If you are going to inject a radioactive element into the blood stream, it will be taken by the blood and will destroy cells, not germs; it

(Testimony of Dr. George V. Kulchar.)

will not kill germs. You have to inject radioactive material into the blood stream through a needle in the vein, not by rubbing oil on. Radium is subject to regulation and control; you must have the proper dosage applied in the proper manner; radium is an extremely dangerous element; it is stored in the bones; it destroys blood cells; it destroys certain vital glandular tissue; its improper use will lead to certain diseases of the blood which are fatal. The deposition of radium in the bone in the form of salts will lead to necrosis, by which I mean, the killing of the cells of the bone.

In my opinion, Colusa Oil would not act as a stimulant to the skin, nor would it increase circulation. Phenol would be a skin stimulant if used in small amounts, but if used in large amounts, it would destroy skin.

An unsulphonated petroleum oil is not a detergent for a skin condition. Crude mineral oil is not recognized by dermatologists as a proper treatment for a skin condition.

I have had occasion to observe the condition of external hemorrhoids and to treat the itching condition which accompanies that condition. The ingredients of the ointment here would have no value in alleviating the itching reaction from hemorrhoids; the benzocaine in the ointment is insufficient; the benzocaine is less than one per cent and we use from seven and one-half to fifteen per cent

(Testimony of Dr. George V. Kulchar.)

in an ointment; you have to use from one to two per cent menthol, and from two to four per cent camphor. This ointment would not act as a treatment.

One of the treatments for acne is the X-ray; acne occurs in an oily skin; a petroleum oil would have an aggravating effect. [47] Acne occurs as the result of a plugging of the oil gland; it occurs as a result of hereditary changes; an oily skin which is hereditary, and is also racial. The application of oil to this surface will lead to the plugging of oil glands and aggravate acne.

This Colusa Oil is not penetrating to the skin; it is impossible to penetrate the skin with ointments except into the hair follicles.

The witness then testified further on cross examination, as follows:

I have never used these products in treatment of patients. I do not recall Mrs. Gilbert L. Mead; it is quite possible I have treated her for psoriasis, but I don't recall it.

Here Mr. Gleason asked Mrs. Mead to stand up in the court room, and she did so.

"Mr. Zirpoli: That has nothing to do with his opinion as an expert and the testimony he has been giving with relation to these diseases. If you have that in mind and will make that clear——

"The Court: Keep in mind the limited testimony in chief.

(Testimony of Dr. George V. Kulchar.)

“Mr. Gleason: Yes, your Honor. I am trying to cross examine this expert, or so-called expert, on psoriasis, and I am going to use as the basis of my cross examination a patient of his by the name of Mead.

“The Witness: I do not wish to qualify as an expert on psoriasis.”

There is no other Dr. Kulchar in this locality who is a skin specialist other than myself.

DR. FREDERICK A. FENDER

was then called as a witness on behalf of the Government, and testified as follows:

I am a surgeon. I graduated from Harvard Medical School in 1929; I then was what is called a surgical house officer at the Brigham Hospital in Boston; that is the Harvard Teaching Service; later as resident surgeon, also at Boston for one year. That is [48] the Harvard Neurological Unit. My next work was assistant in surgery at the University of Rochester School of Medicine, and I was there two years. At present I am an instructor in Stanford Medical School, clinical instructor in surgery. I am also a practicing surgeon. I am not a member of any medical associations other than the usual county medical society, and the A. M. A. I have written articles which have been

(Testimony of Dr. Frederick A. Fender.)

published in medical publications. I have treated hemorrhoids, many cases, say from fifty to three hundred. I also have treated cuts and burns and varicose ulcers. Yes, I have been told about the composition of this Colusa Oil. In my opinion, it would not be efficacious in the treatment of varicose ulcers, nor would the taking of the oil in capsules prove efficacious in the treatment of varicose ulcers.

“Q. Would the two taken in conjunction prove efficacious?

“A. I wish we could find any combination that would, of anything.”

In my opinion, this oil would not be good in the treatment of burns or of cuts. It would be hazardous to use it in cuts or bruises if the material had not been sterilized, and if not kept sterile, it might introduce contamination or infection.

I know very little about radium; the trouble with radium is that it kills tissue just as well as it does germs, so it has to be used with a good deal of restraint.

Regarding the ointment and its composition, it would not shorten the course of hemorrhoids, nor cure or improve them. If smeared on, it might make them less subject to friction. I don't think there is enough benzocaine in the ointment, nor would there be a value from 25.93 per cent zinc oxide; that is rather too small an amount.

The witness testified further on cross examination:

(Testimony of Dr. Frederick A. Fender.)

I have never used this oil in treatment of patients. I have never heard of Dr. J. B. Bissell, former director of the Bellevue Hospital in New York City, specialist in radium. I have [49] heard of Dr. Frederick Bliss, professor of medicine at Rush Medical College, but I don't know that he is an eminent specialist on radium. I have never heard of Llewellyn Jones Llewellyn, the head of the Royal Hospital at Bath, England.

Mr. Zirpoli then read into the record the contents of Government Exhibit No. 6. The Government thereupon rested.

Thereupon, the defendants called

FRANK FAZIO

as their first witness who, on direct examination, testified as follows:

I reside in Redwood City and am fifty-four years of age; I suffered from psoriasis for twenty-seven years; it is a skin trouble that even doctors don't know so far; it isn't contagious; not contagious, but they claim it is incurable. When this trouble came on my skin, I called on a doctor, and I had family doctors and skin specialists; they could do nothing for me; I was in Clarksburg, West Virginia, when this skin trouble appeared and the doctors there finally sent me to Battle Creek, Michigan; later I

(Testimony of Frank Fazio.)

went to the Ann Arbor Hospital, University of Michigan; then to Queens General Hospital in New York, a skin and cancer hospital; and besides I visited clinics. I treated with skin specialists in San Francisco and one in Redwood City, and then the University of California; I went to the University of California for a year between 1932 and 1934, and 1936 to 1938; I have been there right along. None of these doctors cured me. They tried to; they did lots, but I hate to say it, but I saw no results.

Mr. Gleason then offered a photograph which was marked Defendants' Exhibit A for identification.

My body was covered with this disease. I think the picture will tell; it is rough like scaly, rough lesions. I recognize Defendants' Exhibit A for identification as my picture; it is a picture of my back; it was taken in March of this year.

The photograph was then admitted in evidence and marked Defendants' Exhibit A. [50]

I have used Colusa Natural Oil since March of this year to cure this disease; it has helped me a lot.

Mr. Gleason then offered another photograph and asked that it be marked Defendants' Exhibit B for identification, and it was so marked by the Clerk.

I recognize this picture as that of my back; it was taken in April of this year; I had used Colusa Oil for three weeks when this picture was taken;

(Testimony of Frank Fazio.)

the scales and lesions that were on my back disappeared as a result of the use of this oil; this oil removed scales and lesions from other parts of my body besides my back; I had psoriasis on my back, the front part of my body, on my legs and arms; it covered most of my body; the use of this oil cured other parts of my body.

The photograph marked Exhibit B for identification was then admitted in evidence and marked Defendants' Exhibit B.

The witness was then cross examined and testified:

I came to California in 1932 from Clarksburg; my occupation was a barber, and I am still a barber. I went to the University of California clinic for a year starting 1932; I went from 1936 to 1938, but I have not been there since 1938; I treated with Dr. Deering in San Francisco, and Dr. Ames in Redwood City. I do not consider myself completely cured; I have only used the oil a short time; I am seventy-five per cent better.

DR. WILLIAM G. WOODMAN

was then called as a witness on behalf of the defendants and testified as follows:

I reside in North Hollywood where I am an osteopathic physician and surgeon; I am a graduate doctor; I am on the staff of the Los Angeles County

(Testimony of Dr. William G. Woodman.)

Hospital; I graduated in 1928 and have been in practice ever since; I have had experience with psoriasis. When I first got out of school, I tried to treat some cases using the Krause-Robin treatment, and did not get any results. That is the standard accepted treatment; I then stopped treating psoriasis [51] entirely; I am not a dermatologist; I don't go in for skin conditions; I refused to treat psoriasis, telling the patients to save their money.

I did, however, treat several psoriasis cases in 1940, using Colusa Natural Oil. I have records of five cases; I treated others, two neighbors over the back fence, you might say. One of the five cases referred to was extremely severe. David Matthew was the extremely severe case. Mr. Colgrove mentioned the oil to me and suggested I try it; this man was an old patient of mine and had to meet the public all the time. The psoriasis was on his face; he called and begged me to do something; we tried this oil on him and got some nice results; he cleared up; I treated him from April 1st to June 9th. He wasn't cured when I last saw him, but he had got much better and only had two or three small lesions when he moved away to his home in Texas. When I first started to treat him he had multiple lesions, probably three-fourths of his face was covered with psoriasis lesions, and on the shoulders. These lesions are a dry, crusty, brownish colored irritation on the skin.

I treated other psoriasis cases with Colusa Oil;

(Testimony of Dr. William G. Woodman.)

one attorney in the building had it on the shin and I gave him some oil and told him how to use it and it completely cured him. I saw him Monday and there were no lesions there at all. Pankey was another case who had it on the flexor surfaces of the arms and knees; that man didn't get completely well; he got better and the itching stopped, and the crustations would disappear; but he is a man who drank and that is contra-indicated in psoriasis.

I would not hesitate to recommend Colusa Natural Oil in the treatment of psoriasis; I don't know why it cures; it is just one of those things; they seem to get better; I have not treated a case with this oil where I got unfavorable results. I prescribed capsules for Mr. Matthew; there were no unfavorable results from [52] his using the capsules.

The witness then testified on cross examination as follows:

I am a graduate of the College of Osteopathic Physicians and Surgeons, Los Angeles; it is not an M.D. degree; it is D. C. physician and surgeon, unlimited license to practice, using any method; I am not a dermatologist and I am not a skin specialist. Psoriasis is essentially a skin disease. I don't make it a practice to treat skin conditions; I have treated some ten or twelve persons who had psoriasis, but I have records of five. Before coming into court I did not refresh my recollection by going over my records, I merely copied down these dates before I

(Testimony of Dr. William G. Woodman.)

left Los Angeles to come here; my records are in my office where they may be examined, and I have no objection to sending them up here; I understand according to law they should be kept in my office.

The witness further testified on re-direct examination:

Before coming here to testify, I was called on by a representative of the Federal Food and Drug Department. I can't name the man, but he suggested I not be present at this trial. I have telephoned Los Angeles to see if he left a card. This man who called on me did not tell me not to come to the trial, but he suggested that I be busy; those are the words he used. He asked me if I was going to testify, and he said to me, "Well, doctors can be made a fool of on the stand", and suggested that I be busy on that day. I don't know his name, but those are the words he used; I never met him before or since. I phoned Los Angeles for his card but I didn't keep his card; I didn't think I'd have any further use for it. I could identify him if I saw him; he weighed about 170 pounds, was about 5' 8" and gray hair; he had on a gray suit and his teeth were far apart in front; his card said "Inspector of the Bureau of Foods and Drugs" or something of that sort. He was in my office about five minutes; this man had a letter I had written to Mr. Colgrove, a testimonial. I do not know anything as [53] to the causes of psoriasis; the ideology is not known; by ideology I mean the cause.

DONALD R. CRAWFORD

was then called as a witness on behalf of the defendants, and testified as follows:

I live in Los Angeles, and am a ticket seller for the Union Pacific Railroad in its depot ticket office; I have used Colusa Natural Oil for a skin ailment which was poison oak. This affliction dates back many years; each spring it would form small water blisters accompanied by a red rash, which rapidly spread to various parts of the body and would cause excessive weeping; there was severe itching and after the weeping had stopped, the skin would be very sore for quite a long period of time. It normally started with the hands, and on two occasions I have had it from my head to my feet. In 1940 I lost three weeks from work; I worked two weeks when my face was disfigured; this condition was accompanied by intense itching. I used this oil first in 1940; I went to a physician who treated me with a solution I had known as Santiseptic, for about three weeks, but it kept on spreading, as was the usual manner. I had heard of Colusa Natural Oil and thought I would try it. I was lying on the floor as I could not stand the bed clothes. I had saturated a turkish towel with the solution coming out of the blisters. I applied the oil at one o'clock in the morning, and at one-thirty that weeping stopped and you could practically see that thing heal. Inside of one week I was back on the job

(Testimony of Donald R. Crawford.)

with no more time lost. In 1941, I had a recurrence and immediately used this oil and had it quite well cleaned up in three days' time; the blisters were all dry, and I had been off work one day. Under the rules, I had to see the company physician who gave me three shots hypodermically on alternate days; it took six days to complete the shots; well, after the first shot, I got what is called a reaction which seemed [54] to cause more blisters, but upon the completion of the third shot, I really broke out into a mass of sores; it was just a very, very bad case, similar to what I had gone through the year before. I was, however, able to heal up that condition within a week to ten days' time with Colusa Oil; the oil gave me relief immediately from that agonizing itching; I was able to sleep.

I was visited on two occasions by agents of the Federal Food and Drug Department who came to see me about my testimonial; one of them said to me I might just as well use a crankcase oil.

In previous years I had tried countless remedies; none ever gave me the relief that Colusa Natural Oil gave me. No, I have no interest in this case.

On cross examination, the witness testified:

I did not try crankcase oil; he did not tell me not to come to court.

At this point, Mr. Zirpoli asked permission to recall Dr. Woodman to the stand, and, on resuming the stand, Dr. Woodman testified further as follows:

(Testimony of Donald R. Crawford.)

Some of those I treated with Colusa Oil, that was the only treatment; it was the only treatment for Butterworth, that was the case of the legs; it was the only treatment for Pankey, who was fifty miles from my office. I used a quartz light also in connection with treating Matthew; also a short wave to drive the heat in. I use the word "arrested" not "cure"; I can't say which did the work, except that these other modalities I had used before on psoriasis in years before.

Yes, the inspector I talked to was John P. Kathe; the only testimonial I had ever given was the letter I wrote Mr. Colgrove; I don't recall giving him more than one and didn't recall that one until Mr. Keefe brought it to my attention. I have never signed "M.D."; that is an error on the letter he showed me.

The letter was marked as Government's Exhibit No. 13 for [55] identification.

HENRY N. STABECK

was then called as a witness on behalf of defendants, and testified as follows:

I reside in Los Angeles; I am sixty-seven years of age; I was formerly an investment banker, but am now buying for the Housing Authority of Los Angeles; I had stomach trouble for four or five

(Testimony of Henry N. Stabeck.)

years prior to 1940 and trouble with one of my feet for four months prior to January, 1940; it was hard for me to digest my food; I was seldom hungry, and if I ate any greasy foods, I had severe pains.

“Q. And had you prior to January of 1940 used any drugs for that stomach trouble?

“A. Yes, sir.”

I doctored with Herbert W. Jones of Minneapolis for two years, and my doctor there said I had ulceration of the stomach. I later moved to Los Angeles and had a recurrence of the trouble, and Dr. Westphal of Glendale told me I had a recurrence of stomach ulceration. In 1936 or 1937 I had another recurrence; in 1940 I met Mr. Colgrove and he said, “Why don’t you try Colusa Natural Oil.” I commenced taking the capsules; I first took two a day and later three a day. I was entirely relieved and haven’t had any recurrence.

I had an irritation and swelling on my left foot, diagnosed as athlete’s foot; I used Colusa Oil on that; the result was that it cleared up entirely and I have had no recurrence. It took six or seven days to clear up; it relieved the itching the first day.

The witness further testified on cross examination:

This stomach condition was first diagnosed in 1921; I suffered from time to time until the last recurrence in 1937; I was always careful of my

(Testimony of Henry N. Stabeck.)

diet, but I am not careful of it now. I was under the care of a physician in 1940; it took fifteen minutes to half an hour for the doctor to determine I had a recurrence of my stomach ulceration; he knew of my former trouble; I took X-ray [56] tests in 1921, but none since.

I applied the oil to my foot that had the swelling and irritation; I cleaned that foot every day and rubbed the oil on it both morning and night very diligently; I did that for six or seven days.

On redirect examination, he further testified:

Since I used Colusa Natural Oil, I have not adhered to this diet; I have not dieted at all since I was cured with this oil.

MRS. JOSIE ALICE MEAD

was then called as a witness by the defendants, and testified as follows:

My husband is Dr. Gilbert L. Mead, a chiropractor in Oakland, California; I am a hairdresser. I formerly suffered from psoriasis for three years; I treated with different specialists, one for eight or ten months in San Francisco; he finally told me I worried him more than any other patient, that I was ruining his reputation; he tried X-ray, gave me quartz and various shots, gave me medicines and then he finally put methylene blue on my feet and painted those twice in two weeks, told me to

(Testimony of Mrs. Josie Alice Mead.)

use aromatic spirits of ammonia to remove that. My feet broke down and he said I didn't respond. My work is hard and the hours are long, and finally I had to wrap the sore parts with towels; I couldn't wear white stockings; at night I would have to change towels. I finally consulted another skin specialist. The first specialist I consulted was Dr. George V. Kulchar; he is the one who gave me the prescription that took the skin off; it was the same Dr. Kulchar who said yesterday that he couldn't remember me; I saw him in February of this year; previously I had been to his office from the 1st of June of last year. Dr. Kulchar told me mine was the most difficult case he had had. Dr. Kulchar never cured my condition; it would get better then mushroom worse than ever. This disease affected me all over; I suffered day and night; the itching [57] was terrible; it affected my feet, knees, elbows and the palms of my hands, accompanied by this scaly condition.

I eventually tried Colusa Natural Oil only four weeks ago. I took the capsules and the oil for this psoriasis condition and it began to soothe me, and in five days I was so relieved that I couldn't express my gratefulness. I am almost completely cured; I have no swelling; there are a few deep pits that when I dress them morning and night I see improvement. I am almost completely cured now.

Mr. Gleason then offered in evidence a bottle of

(Testimony of Mrs. Josie Alice Mead.)

ointment and the Court ordered the bottle marked for identification, and the Clerk marked it Defendants' Exhibit C for identification.

I received the prescription from Dr. Kulchar and took it to the drug store in the Medical Building and had it filled, and this is the bottle I received; it is numbered 248231, Dr. Kulchar; I used the ointment; it was the methylene blue that took my skin off; that was his last treatment before I quit taking treatments from him.

Thereupon the bottle was admitted in evidence and marked Defendants' Exhibit C.

There was no cross examination.

MRS. TERESA J. LOUGHRAN

was then called as a witness on behalf of the defendants, and testified as follows:

I am sixty-two years of age; I reside with my niece, Kathie M. Harliss; since 1906 I have suffered from varicose ulcers; I sustained an injury the morning of the big earthquake; when I would suffer an abrasion, it would cause an aggravated condition which would result in an abscessed condition; the last occurred three years ago; the ulcers extended from the ankle almost to the knee on both limbs. I went to bed on January 26, 1941, seventeen months ago; I stayed in bed for eleven months. This condition would clear up a little and then go

(Testimony of Mrs. Teresa J. Loughran.)

right back to the other—to [58] the other condition, and it was that way for eleven months until I started in to use your Colusa Oil. During the first part of this period that I was in bed, I had been under the care of a physician, Dr. Roget, but there was no charge and he stopped coming because he just told me to keep on using the medicine that I was using, because I had had a heart condition and I had to use the heart medicine for resting and getting the heart back to normal.

I then used Colusa Natural Oil; after being in bed eleven months, my limbs were in the same condition; my limbs were in a raw condition when I first used Colusa Natural Oil, but it felt sort of soothing; the next morning, I used it and could handle my limbs with less pain; after the third application, I could rub them; they were thoroughly cured in three weeks and I was able to get up. I am now up and around the house. My limbs are thoroughly cured.

The witness further testified on cross examination:

My heart is better; I have been taking digitalis right along, and I have had seventeen months of rest.

MRS. AGATHA DEVLIN HARLESS

was then called as a witness on behalf of defendants, and testified as follows:

I am a housewife; I formerly suffered from a skin ailment; I had a lingering case of eczema on my hands; it first broke out with a tiny rash, then it spread to my thumb and then it spread and spread until it affected both hands; I lost three fingernails. I consulted several doctors but they did not cure this disease. I had x-ray and ultra-violet ray treatments and various ointments and salves, and finally I tried Colusa Natural Oil. I started using this oil in August, 1941, at a time when both hands above the wrists were covered with eczema. After using Colusa Natural Oil for two weeks, I began to notice some difference and then very definitely they started to clear up; I used it every night for [59] quite a while, and then I finally was able to omit using it from time to time. I don't need to use it any more. I was treated by Dr. Miller and by Dr. George V. Kulchar.

The witness further testified on cross examination:

Yes, I had eczema. No, I do not know the cause of it.

MRS. RENA GERLACH

was then called as a witness by the defendants, and testified as follows:

I reside in Berkeley; I am a housewife; I formerly suffered from a skin disease of some kind; I never really found out what it was, but some doctors said I was allergic, and others said it was a vegetable poison. This disease was all over my hands and went up to my arms, just running all the time; I had to keep my hands raised up, and because they were so sore I couldn't touch anything. My son had to feed me most of the time; my skin was running and itching; my hands would swell three times their normal size. I used every patent medicine on the market. I once got blood poisoning; Dr. Kendopp lanced my hands for fourteen days; I doctored with Dr. Fanning in Sacramento; he is a skin specialist. I used water and mud packs. I then resorted to Colusa Natural Oil in February of this year; in three weeks it cured my hands and arms all up. (Here the witness removed her gloves and exhibited her hands and arms to the jury.) I am proud of what it has done for me; it stopped the itching immediately. I suffered mentally in that I couldn't sleep; I couldn't feed myself; I couldn't wash my face. With two hands tied up you can't do anything.

On cross examination, the witness further testified:

Although these doctors treated my hands, I couldn't say what was wrong with them, because the doctors couldn't tell me what it was.

HOWARD EVERETT

was then called as a witness on behalf of the defendants, and testified as follows:

I reside at 1332 South Hope Street, Los Angeles; I am past [60] seventy-two years of age; I hold a real estate broker's license; I was formerly in the banking business. I have suffered from hemorrhoids for probably thirty-five years or more; I have tried everything available through purchases at drug stores, besides consulting doctors and using various ointments and applications. I was formerly sales manager for Colusa Products Company, from April 13, 1941 to January 16, 1942. I had used this Colusa Natural Oil Ointment for the hemorrhoid condition for several months prior to my association with the company, and since I have left the company. This ointment gives greater relief than any product or treatment I ever had; it stops the itching and flow of blood and gives almost instant relief. It does assist in relieving the discomforting irritations of hemorrhoids.

“Mr. Gleason: Did you ever have any occasion, Mr. Everett, to observe personally the effect of Colusa Capsules—the use of Colusa Capsules—on any other person?

“Mr. Zirpoli: I want to interpose an objection, your Honor. While I recognize that it is proper for counsel to bring a witness into the courtroom who himself used it and can testify as to what the effect has been with relation to his personal use,

(Testimony of Howard Everett.)

he cannot call a lay witness to testify as to the effect of the use of a product of this nature on another person, particularly since he is not qualified. He cannot tell us, nor is he qualified to tell us, of the condition that the particular person may have been suffering from; nor is he qualified to tell us of the results or the beneficial effects.

“The Court: Just a moment. Be seated, gentlemen. The Court is prepared to rule. Read the question, Mr. Reporter.”

(Question read.)

“The Court: The objection will be sustained.

“Mr. Acton: Will your Honor allow us an exception to the last ruling? [61]

“The Court: Certainly.

“Mr. Gleason: I don’t want to go contrary to the Court’s ruling. I would like to make a statement of the purpose of the testimony and an offer of proof so that the Court will be acquainted with what—I can’t go on questioning, of course, to cover the situation we were attempting to cover.

“The Court: There is nothing before the Court at the present time, gentlemen. You must proceed along the line——

“Mr. Gleason: Q. Did you have a friend, Mr. Evertt, who was suffering from ulcers?

“Mr. Zirpoli: Just a moment, your Honor.

“Mr. Gleason: Withdraw the question.

Q. Did you have a friend who used Colusa Natural Oil to your knowledge? A. Yes, sir.

(Testimony of Howard Everett.)

Q. Did you see him prior to his use of the oil?

A. Yes, sir.

Q. Will you describe the physical condition of the man prior to his use of the oil?

“Mr. Zirpoli: What do you mean by ‘physical condition’? His appearance as the witness actually saw it?

“Mr. Gleason: That is what we are limited to under your objection.

A. Why, he was ill.

“Mr. Zirpoli: Your Honor, that very statement is a conclusion; that he was ill calls for a conclusion; that is not a physical description. I ask that that be stricken from the record.

“The Court: It may go out.

“The Witness: He was thin, depressed.

“Mr. Zirpoli: I ask that the conclusion that he was depressed go out; that obviously is not a conclusion that a person can make.

“The Court: It may go out.

“Mr. Zirpoli: He was thin. [62]

“Mr. Gleason: That is all. Never mind that. That is all.”

On cross examination, the witness testified:

“Mr. Zirpoli: You don’t claim to be cured of your hemorrhoids now, do you?

A. No sir, I do not.

“Mr. Gleason: There is no evidence in the case of any claim that this does cure him.”

DR. W. T. S. VINCENT

was then called as a witness on behalf of the defendants, and testified as follows:

I am a doctor, a medical man; my office is in the Fannin Building, Houston, Texas; I have practiced medicine for fifty-two years; I am seventy-eight years of age; I received my medical training at the University of Cincinnati and graduated in 1889; I am an M.D. I have been a specialist all of my career, specializing in blood, genito-urinary and dermatology; by dermatology, I mean treatment of skin diseases; in the course of fifty-two years I have treated practically all skin diseases. Some of the skin diseases are known as eczemas, psoriasis, acne, varicose ulcers. There are a great many cases of skin diseases in Texas. I am licensed to practice medicine in five states. I have been continuously in Houston, Texas, for the past seventeen years. I have treated hemorrhoids. There are ten or twelve different types of eczema. Psoriasis is considered very difficult to cure; many have said it is incurable. I am today treating ten or twelve cases of varicose ulcers. A varicose ulcer usually comes from the rupture of an over-dilated vein, leaving a sore or ulcer. It is always indurated, meaning, dug out deep underneath.

There are two kinds of acne vulgaris; one is rosacea, which is just of the skin, and the other is acne vulgaris, which very often commonly arises from a comedone or blackhead and oily skin surface, and which is very stubborn and difficult to treat.

(Testimony of Dr. W. T. S. Vincent.)

I have used Colusa Natural Oil in the treatment of my patients, starting a little over three years ago; I have used it [63] hundreds of times. I have treated psoriasis with this oil; fifty or more cases would only approximate it. I have treated many cases of eczema; it would be difficult to approximate the number.

I remember Carl Alsobrook who was afflicted with psoriasis; this condition was all over his back, chest and legs, and one large spot on his cheek; it was a terrible condition; he was almost a solid scab on his back and chest. I examined him; when he removed his shirt, there was an absolute shower of scales which fell to the floor, shook out of his shirt and fell from his body, so much so that he turned to me and said, "You will have to have this place cleaned up when I get out of here." I treated him with Colusa Natural Oil for a number of months; he came in 1941 and I was all through with him early this year. I cured him absolutely with this oil. I had photographs taken of this man's body. No, I did not cause any pictures to be made when he first came to me for treatment. I wanted him to have pictures taken because it was a very, very exceptionally bad case, but he wouldn't go; he wouldn't go because he was ashamed to go, he said, and strip before the photographer.

The first photograph was marked Defendants' Exhibit D for identification.

The second photograph was marked Defendants' Exhibit E for identification.

(Testimony of Dr. W. T. S. Vincent.)

Exhibit D is a photograph which I caused to be taken of Mr. Alsobrook's back, and Exhibit E is a photograph of the front portion of his body. These pictures were taken about six weeks after his treatment with Colusa Natural Oil started. I had treated him continuously during that six weeks' period. These pictures truly depict the condition of the boy's body as I saw it at that time.

Thereupon, the photographs were admitted in evidence as Defendants' Exhibits D and E, respectively. [64]

These pictures do not show the condition of the boy's body when he first came to me for treatment. They were taken six weeks later when there had been quite an improvement. The improvement was wonderful from the beginning, because it was an almost impossible case to start with; there was a wonderful improvement in his case. I recently had occasion to examine him. Last month, he came to my office for the purpose of being examined according to Texas laws so that he could get married. I examined his body and he had no signs of the disease, not even scarified surface of the skin. He was completely cured with Colusa Oil.

I also remember the Dalkins case which was a case of psoriasis. Dalkins lived on the edge of Houston; he had spots on his skin and the itching was so terrible that he lay awake and scratched all night, and I think he scratched his face and got it into his face——

“Mr. Zirpoli: Your Honor, I am going to object

(Testimony of Dr. W. T. S. Vincent.)

to the doctor saying that he lay awake and scratched all night, and also to the doctor saying that he got it into his face. He wasn't there; he didn't sleep with him.

"The Court: Let the record stand. Proceed. Let's get through with this case."

He was in such condition he was ashamed to come out in public very much. I used Colusa Natural Oil and gave him the capsules internally; he practically got rid of that trouble in six weeks, an amazingly short time to me. He was cured, and he was cured with Colusa Oil and capsules. I saw Mr. Dalkins several weeks ago. My treatments with this oil have been to a large extent successful, though there is no such thing as a cure-all. I never saw a case as bad as the Alsobrook case either before or since; it was the worst I had ever seen.

I treated quite a few cases of athlete's foot with this oil; also acne; also varicose ulcers. [65]

"Q. State in some detail the beneficial results that you observed that ensued from the use of these products."

The first beneficial result is the palliative or quieting result. By this I mean, the stopping of the itching and pain. This is a very important part of what we doctors term treatment, because many patients suffer from the nervous condition which is consequent upon these diseases—that is, consequent upon the intense pain, loss of sleep and itching, and so forth, which accompanies these diseases. When you quiet these, you have gained a decisive

(Testimony of Dr. W. T. S. Vincent.)

point in the treatment. Yes, absolutely, Colusa Oil does mitigate the itching and pain incident to these diseases. I have noticed that it does this very generally, almost one hundred per cent; and it does this almost immediately. For instance, using it on the day that the treatment was given, the patients would sleep well that night and wake up refreshed and better.

With respect to the effect of the use of this oil on the skin lesions and the ulcerated condition of the skin that accompanies these diseases, I noticed that the scales would be softened by the penetrating action of the oil and they would almost immediately begin to exfoliate. The oil has a very fine penetrating effect into the skin. I also observed that following the relief of the itching and the alleviation of the skin lesions would come the actual healing. Yes, the oil accomplishes restoration of new skin. Yes, I observed this from my use of this oil in a large number of cases.

“Q. Doctor, what is your opinion, based on your experience and training as a medical man, and based upon the use that you have made of Colusa Natural Oil in the treatment of various ailments, as to the efficacy of that product in the treatment of psoriasis?”

“A. My firm conviction is that it is—that it is the best—I know it is the best treatment I have ever used.”

There are two distinct classes of physicians, the homeopath [66] and the allopath; the great differ-

(Testimony of Dr. W. T. S. Vincent.)

ence in the two schools lies in the dosage, in the amount that should be prescribed per dose.

I have found Colusa Natural Oil as efficacious in the treatment of eczema as I have in the treatment of psoriasis. It has a very fine effect on cases of eczema. There are, of course, many kinds of eczema; we find some are very dry, and some are so wet they are called "weeping" eczema. I have treated both types with this oil. I have also treated athlete's foot with this oil and find it stops the itching almost at once. Athlete's foot is very local; it isn't very hard to reach, and the result of the application of Colusa Natural Oil has been very speedy in athlete's foot.

I have treated varicose ulcers with this oil.

"A. The physician who goes after a case of varicose ulcers aims first to in a way purify the ulceration. It is a punched-out, depressed ulceration, and nine times out of ten when the patient first comes to the doctor and shows up that ulcer or number of ulcers, he sees a nasty, depressed place in the skin of different sizes, filled with pus, very smelly, if you will allow the word; they nearly all have an odor that is not liked by anyone. And the first thing the doctor goes after is to get rid of that pus and lay a foundation for healing—granulations, as we call them."

I have found Colusa Natural Oil to be efficacious in accomplishing this healing condition.

I have also used Colusa Ointment in the treat-

(Testimony of Dr. W. T. S. Vincent.)

ment of hemorrhoids and have found it very satisfactory as to itching and burning, the bearing down feeling that comes from distended hemorrhoids. I have used it on myself for that condition (pruritis) and have found that it stops the itching right away. Pruritis Ani means itching about the anal territory. The ointment is almost immediately remedial; I am not talking about the hemorrhoid proper—I refer to the itching. I don't claim it cures [67] hemorrhoids. In my opinion this ointment is efficacious in relieving the discomfort and irritations of hemorrhoids, and relieves itching and localized irritation in ninety per cent or more of cases. It is my opinion that Colusa Natural Oil is efficacious to relieve discomfort and pain incident to these skin diseases referred to in the information, and it will inhibit the spread of skin irritations and restore the normal skin surface. It is my further opinion that this oil acts on the surface of skin irritations as a stimulant and increases circulation and aids in healing.

The witness testified on cross examination as follows:

Before attending the University of Cincinnati, I took the preliminary work under my own father, and then took the two year course. I took no post-graduate work. I am now practicing in Houston, which is in Harris County; I am not a member of any medical society. I have not written articles for publication, having confined my practice to my own

(Testimony of Dr. W. T. S. Vincent.)

work. I am a specialist in blood, genital, urinary and dermatology. I operate a clinic in Houston under the name of "Wage Earners Clinic". It was previously known as "Dollar Medical Clinic". I have never operated a clinic in Dallas nor practiced there. I bought the clinic from a man named Burrows about seventeen years ago.

"Mr. Zirpoli: Q. What is homeopathy?

"A. It is a method of treating by infinitesimal doses as compared to the allopath. The doses are always very much smaller than allopath.

"Q. But it is more than the treatment by infinitesimal doses, isn't it? Doesn't it consist of a knowledge of the individual being treated, and his reaction to various drugs or chemicals?

"A. I presume so. Homeopathy is a school of medicine which is the same as allopathy, except one school believes in very small doses, compared to the allopathy using the larger doses; and they are [68] termed the regular school.

"Q. It is not the size of doses? Isn't homeopathy predicated on the law of similars?

"A. They are similar; they are used for similar things.

"Q. Is it predicated upon the fact that you determine what reaction a particular drug will have on a healthy person? A. No.

"Q. And the symptoms that will be produced thereby? A. No, sir.

"Q. Let me finish, please. A. Yes.

(Testimony of Dr. W. T. S. Vincent.)

“Q. Then, you administer the same drug to the sick individuals who had a group of symptoms to which the drug had produced in the healthy individuals?

“A. Not necessarily. The allopath uses a lot of drugs the homeopath doesn’t.

“Q. Do you know whether they use the compounds or individuals? A. Either way.

“Q. Do you know of Hahnemann?

“A. He is supposed to be the founder of homeopathy.

“Q. Do I understand, then, that all there is to homeopathy as differed from allopathy is the size of doses that are administered?

“Mr. Gleason: Just a minute. This is not proper cross examination. The witness testified the difference lies roughly in the size of the doses. Counsel won’t contend the allopaths don’t study the cases and study the effects.

“Mr. Zirpoli: That is an improper definition to say that the difference all depends upon the size of the doses.

“The Court: You may answer.

“A. Repeat the question.

“The Court: Read the question.

(Question read.)

“A. The homeopaths are known to use drugs that the allopaths don’t, and I am not acquainted with homeopathy. I have never paid any attention to it. I suppose you know that a good many of the [69] allopathic school look upon homeopathy as

(Testimony of Dr. W. T. S. Vincent.)

a joke. However, I never have held that view of it.

“Mr. Zirpoli: Q. You said the difference was in the size of doses. You don’t contend that is the whole difference?

“A. Not altogether, because they treat cases in a manner different from allopathy.

“Q. I will read you a definition, and you tell me whether you consider this a proper definition of homeopathy: ‘A system of treatment of disease by the use of agents which, if administered in health, would produce symptoms similar to those for the relief of which they are given.’

“A. I don’t know whether it is or not. I have never studied anything about homeopathy.”

Psoriasis is not a condition that always comes and goes. I have treated many cases of psoriasis and I have never treated a case of psoriasis that comes and goes of its own accord. I have never prescribed this oil for internal use in treating athlete’s foot. I think every doctor makes additions at some time to this or that which in his judgment he sees necessary or fit in treatments. [70]

“Mr. Zirpoli: Did you ever use any other drug in the treatment of acne other than Colusa Oil?

“A. I never found it necessary * * * unless it was for constipation, or something of that kind.

“Q. Did you ever give any other treatment of any other kind while using the Colusa Oil for acne?

“A. No, it was not necessary.”

I had no chemical analysis of Colusa Oil made.

(Testimony of Dr. W. T. S. Vincent.)

I saw a statement of its contents. It had ichthyol content; I knew this by its odor. I wouldn't use anything in the dark. I don't care if it came from Heaven. I looked it over and saw it was supposed to have ichthyol and I used it. I don't know what its component parts are. If a thing works all right I try it and if it doesn't, I discard it.

There are ten or twelve kinds of eczema and this Colusa Oil proved good for all kinds, including the weeping type. Its penetrating effects seem to do the work. I don't think the causes of eczema are known. I treated A. J. Guidry for *acne vulgaris*; for a while I had excellent results, but he had a return of it later on. As I remember, that young man was almost unfit to be seen on the street, when I first started to treat him; that was a year ago or more. I cleared up the *acne* at that time and he was able to go back to work. I treated him for several weeks; I think I gave him something for his stomach as his digestion was bad. Some cases require attention to diet, and some don't.

"Mr. Zirpoli: Q. Well, are we talking about *acne*, or eczema.

"A. Any of them, as far as that is concerned.

"Q. In the case of Guidry, you prescribed a diet, because you thought that condition was necessary to his treatment of *acne*? A. Yes.

"Q. What was the medication you prescribed?

"A. Nothing except cleansing.

"Q. What other treatment?

(Testimony of Dr. W. T. S. Vincent.)

“A. No other treatment. [71]

“Q. None, whatsoever? A. No.

“Q. You are positive?

“A. I don’t remember giving him any other treatment.”

Athlete’s foot is a disease of fungus growth. No, in my opinion, bacteria are not fungi. It was formerly hard to handle, but I haven’t had any trouble with it of late.

“Mr. Zirpoli: Q. In your opinion, Doctor, is bacteria fungi? A. No.

“Q. Have you made any study of fungi and the classifications of fungi?

“Mr. Gleason: I object to that as improper cross examination.

“The Court: Proceed.

“A. No, I have not gone into deep study of any of these things very much, because the school of experience is about all I needed, I thought; and I have been getting along very well with that.

“Mr. Zirpoli: Q. Do you know the two primary classifications of fungi?

“Mr. Gleason: Just a minute. We object to this as not proper cross examination.

“Mr. Zirpoli: Q. Well, let me ask it this way: Do you know how many classifications there are?

“A. No.

“Mr. Gleason: I object to that as immaterial.

“The Court: Proceed.

“Mr. Zirpoli: Q. Do you know of the schizomycetes classification? A. No.

(Testimony of Dr. W. T. S. Vincent.)

“Mr. Gleason: I object to that as immaterial.

“Mr. Zirpoli: Q. Do you know what the eumycetes fungi are? A. No.”

Sulphur is a very common drug and it is used in many types of application, not only that, but internally. As to the amount, [72] it depends on what I am using it on. It doesn't require very large doses, anywhere from a half to two or three per cent. I think I have prescribed a medication with a half of one per cent of sulphur in it for eczema, but I cannot give you any name for such preparation. I have my own drug room and follow my father's method of prescribing his own medication. I compound almost everything I use in my practice in my drug room. I haven't written a prescription for five years. There is too much of that. There are a thousand remedies that you could write prescriptions for that the doctor writing them doesn't know anything about at all; only from what he reads.

“Mr. Zirpoli: Q. You make up your own compounds and do that in your own room; and am I to understand you never made a test of this oil to determine whether ichthyol is present?

“A. You are going into chemistry, and I don't know anything about chemistry; only medicine.”

Yes, this Colusa ointment works wonderfully in the treatment of hemorrhoids. There is not a very large dose of benzocaine in this oil, probably two to five per cent is quite sufficient for a treatment.

(Testimony of Dr. W. T. S. Vincent.)

I have noticed there is less than one per cent here. I sometimes go and dip into my ichthyol jar and my sulphur jar and mix up an ointment, and because of long experience I don't have to use the scales.

I think I had a patient named Ruth Burns, but I have a large practice and I can't remember all names. I do remember Guidry. I only keep case records; I have never sent out a bill in my life; I figure if a man cannot pay, he can get off with it. Yes, I kept a card case record of A. J. Guidry.

MISS EVELYN MARIE COSTELLO

was then called as a witness on behalf of defendants, and testified as follows:

I am a typist; I formerly suffered from a skin disease known as eczema for seven years; it affected various portions of my body and was accompanied by an itching condition, very much so. I treated at the Mayo Clinic at Rochester for three years; they did not cure me. I treated with doctors here, but none of them cured me. Yes, I went to many doctors; every time I would hear about a doctor who might help me, I went to him. Yes, I could give the [73] names of many of these doctors. I finally tried Colusa Oil about two months ago; it helped me very much; I don't know if it has cured me, but it has given me lots of relief; my skin

(Testimony of Miss Evelyn Marie Costello.)
has become smooth again; the redness has disappeared and the itching stopped; I had used this oil only five or six days and I noticed it was better. (Here the witness showed her hands and arms to the jury.) It alleviated my itching condition very much; it did this very quickly. I had this eczema on various portions of my body, large patches of it. I had it on the top of my hands and all over my arms. Immediately prior to my use of Colusa Oil these portions of my body where I had this eczema were very red and scaly.

On cross examination, the witness testified:

The nature of the eczema I had was called atopic eczema. I'll have to wait a little longer to find out whether I am cured or not, but I do think it is much better; that alone is enough.

MARCO SABLICH

was then called as a witness on behalf of the defendants, and testified as follows:

I live here in San Francisco; I formerly suffered from a skin ailment on both arms and legs, called psoriasis; I was treated by over thirty doctors for twenty-three years, both here and in Europe; I went to Europe in 1937, not seeking relief, but seeking to get cured.

The witness was asked to describe the portions of his body which were affected.

(Testimony of Marco Sablich.)

“The Court: Go ahead and take off your coat and show the jury your arms.”

(Thereupon the witness removed his coat and exhibited his arms to the Court and jury.)

My arms, legs and head were affected with psoriasis; this was accompanied by scaling, peeling and itching; the scales dropped off. I used Colusa Oil for five weeks. I started to try it and in three or four days the itching stopped eighty per cent; [74] then the peeling stopped and I could sleep. I used not to be able to sleep, waking up two or three times during the night. The scales disappeared. I consulted five doctors in Europe. In five weeks I have got more relief from Colusa Oil than in fifteen years.

The witness was then cross examined and testified further:

I still have a mark; the peeling is gone, but the red is still there. Every day is better. I had this for twenty-three years. It stayed the same for the last five years. I started using the oil five weeks ago, May 20th.

MISS ADELE DAVIS

was then called as a witness by the defendants and testified as follows:

I am a beauty operator in Oakland; I suffered from a skin disease for five years; the doctor said it was eczema; I couldn't sleep nights it itched so, and

(Testimony of Miss Adele Davis.)

I was miserable all the time; I had previously used many remedies and had consulted doctors; they did not cure this condition; they didn't even stop the itching.

I bought a bottle of Colusa Oil and put the application on as soon as I got home, and I had immediate relief. Really, to me it was magic. That is all I can say for it. I used it and could feel a sort of penetration; from that time on I have never had an itch on my neck. I first used it about in February of this year.

There was no cross examination.

DR. GILBERT L. MEAD

was then called as a witness on behalf of the defendants and testified as follows:

I reside in Oakland; I am the husband of Mrs. Mead who already has testified; I had occasion to use Colusa Natural Oil for a burn; I suffered a burn two weeks ago and I used some of this oil on it; and within half a minute the stinging ceased; it was quite a severe burn.

DR. C. E. VON HOOVER

was then called as a witness on behalf of the defendants and testified as follows:

(Testimony of Dr. C. E. Von Hoover.)

I reside in San Antonio, Texas; I am a Doctor of Science [75] in Pharmacology and Pharmaceutical Chemistry; Pharmacology is the action of all drugs as to living cells and the reaction on the human and animal families. I have practiced the profession of pharmacology since 1928. I am a director of a laboratory and clinical testing agency in San Antonio; it is partially owned by myself and the clinical staff, who do the actual application of physiological tests.

I am a Master of Science from Kings College, London; Doctor of Science and Pharmacology at the University of Vienna; Ph. D. at the University of Vienna in 1928. My first college was the New York Chemical College, now called City College; that was in 1922; there I studied biochemistry for eighteen months; then I was awarded the Smedley D. Butler scholarship and was sent to Kings College in London where I studied for two years from 1924 to 1926; I there studied pharmacology and general science; that is, microbiology; I have a degree of Master of Science from that college; I was at the University of Vienna for two years under the Smedley D. Butler Scholarship; there I received the degree of Doctor of Science; the courses covered microbiology, laboratory, pharmacology and general science. I studied *Materia Medica* at the University of Vienna; we took the *Materia Medica* and used the pharmacopoeia of the United States because we were in the American

(Testimony of Dr. C. E. Von Hoover.)

section. We study the same courses as an M.D., except we don't actually engage in the application and diagnosing, such as to administer medicine and treatment. I graduated from Vienna in 1929.

In 1923 I was with N. C. Goodman's Research Laboratory in New York, one of the largest manufacturing and research chemists in the United States; I was with them about a year; I was part of the clinical staff, testing pharmaceuticals, externally and internally; ointments and various products, new products that the laboratory admitted for testing.

"Q. Did that include the testing or analysis of any drugs or products to be used in the treatment of any skin disease? [76]

A. Yes, pharmaceutical chemistry.

Q. Did you have occasion to test and analyze in this employment drugs and preparations for the treatment of skin diseases?

A. Yes, we had clinical material from the various charitable clinics where we obtained the material; and, of course, the M.D.'s were always in consultation with the doctors of science. We tested out on a patient to see if a preparation was worth the therapeutical value, or if it was dangerous to the patient. We tested the safety of the preparation."

In 1930 I organized a clinical testing agency under my own name, and there I represented the manufacturing chemists, and I have operated the

(Testimony of Dr. C. E. Von Hoover.)

agency ever since. Yes, I can name a few of the many firms I have as clients; N. C. Goodman Laboratories, for whom I worked at one time, are clients of mine and I have a clinical investigation under way for them now. I do work for Bauer & Black, in Chicago, Dermo Laboratories, Detroit; Deep Syrol. These firms are manufacturers of preparations for treatment of skin diseases. We are consulting representatives for Emerson Drug Company and Piquot Grape Salts. We also do work for the Vitamin Research Company, manufacturers of synthetic vitamins.

Our work for these various clients may be generally described as follows. The first step when we are retained is to test a sufficient amount of material, and we attempt to look into the formula and pharmaceutical chemistry to ascertain if the formula is in accordance with pharmaceutical standards.

“Mr. Gleason: Q. Let me digress for one moment: Do the men in the pharmaceutical profession have what I term a dictionary? Mr. Doyle terms it a bible.

A. We have a Pharmacopoeia No. 11; and we have the Homeopathic Pharmacopoeia.

Q. What are those Pharmacopoeiae?

A. They are the laws of dosages for internal and external medicines [77] of every nature.

Q. We will come to that later, Doctor; but I wanted to get that cleared up now. On behalf of your clients you take preparations, drug and other

(Testimony of Dr. C. E. Von Hoover.)

preparations and test them for the purpose of determining their therapeutic or curative value?

A. Yes.

Q. Is that your business? A. That's right."

We have a clinic for that purpose. We obtain the human material from charitable clinics for physiological testing. No, we do not make up our minds as to the efficacy of a preparation for treatment of a disease merely by reading a formula, absolutely not. [78]

In my clinic I have the medical clinician, the M. D., the one that diagnoses, the one that prescribes, the one that applies or gives the particular medicine. Dr. Beal is one of my assistants; he is acting superintendent and U. S. Public Health Officer. He is Assistant United States Surgeon, and in charge of the various public health matters, including immigration matters, in San Antonio. In addition to Dr. Beal, I have Dr. A. R. Burchelmann, M. D., he is the examiner and former Health Officer of San Antonio, and past Trustee of the American Medical Society. I also have Major Burby, retired Trustee of the American Veterinary Association, who is my veterinary consultor in the small animal practice. Yes, we use animal therapy to determine, especially, the safety of the preparation, and to assure that there won't be an intolerance of toxicity when applied to the human in the clinic. I keep the case record and follow the physi-

(Testimony of Dr. C. E. Von Hoover.)

cian in the clinic. I am not a physician, an M. D. Yes, these tests are under my direction.

In the course of my practice, I have submitted reports to and testified before the Federal Trade Commission on many occasions, and also before the Food and Drug Administration. I have been a witness for the Federal Trade Commission in labeling matters.

Yes, we made clinical tests in our laboratory and clinic of Colusa Natural Oil and Colusa Hemorrhoid Ointment.

“Q. Without going into details, I want to find out, first, what you did generally in order to test this remedy.

“Mr. Zirpoli: You will have to bring in the doctors that made the test. You cannot take a man who is not a physician and surgeon, and who is not competent.

“Mr. Gleason: This man’s business is to test drugs.”

I made tests of Colusa Natural Oil as a pharmacologist and I have the reports. I also tested the oil on animals. I am not a veterinarian, but I am a graduate of veterinarian life science.

“Q. Did you test the oil on human beings?

A. Yes. [79]

Q. First describe the tests that you made of this oil in its application to animals.

“Mr. Zirpoli: I object. He is not qualified to make an application of medication upon animals,

(Testimony of Dr. C. E. Von Hoover.)

or upon humans, and he is not qualified to treat animals or humans.

“The Court: Proceed.

“Mr. Gleason: Q. Briefly describe, Doctor, the test.

A. We had tests with a——

“Mr. Zirpoli: I object again on the ground this man is not competent to testify.

“The Court: In the interest of time I will allow it.

“A. I tested it with a parasital agency of the product in canine dermatology.”

In this canine dermatology, the follicular mange attacks the roots of the hair. We submit the demodectic folliculum to the microscope in a plate. There are five stages, from the egg to the mature bug. We put them under the microscope to see if they are alive; then we immersed them in this oil and put them away in a germ proof place. In an hour or two we bring them back and put them under the microscope. Yes, I personally did all this. The purpose of this is to determine the germicidal agency, and, if any, parasital. Yes, to determine whether or not this oil would apply to the mange condition of a dog, and whether or not it would destroy it. In these tests of Colusa Oil, I personally observed under my microscope that from the egg to the mature bug, these were dead; we tried this on a number of dogs. Yes, this is the practice we follow in testing for Bauer & Black, Goodman, and the rest of our clients.

(Testimony of Dr. C. E. Von Hoover.)

“Q. Now, with respect to the test that you said you made on human beings, tell us what you did with respect to the testing of Colusa Natural Oil on human beings.

“Mr. Zirpoli: I submit he is not competent to administer [80] oil to human beings as medication, and this is not proper evidence. It is incompetent, irrelevant, and immaterial. He has no right to treat anyone.

“The Court: I will limit it to what he did, himself.”

With respect to these tests on human beings, I reported these findings to the clinicians to assure them of the safety; we had psoriasis, athlete's foot and the different types of eczema. A case record was made out. With the physician we select the patient, and the physician diagnoses the patient. I am with the physician. He dispenses the oil, a sufficient amount for two or three days and the patient returns to the clinic.

“Mr. Zirpoli: Under those circumstances, the doctor is the only competent witness.

“The Court: I have limited the testimony and I instruct the jury it is limited to what this witness has done, if anything, himself, in relation to this test, so-called. Proceed.”

We procured our patients from the Robert Greene charitable clinic. Yes, I saw the patients, absolutely. I observed their condition. I personally took scrapings of skin from the patients in athlete's foot

(Testimony of Dr. C. E. Von Hoover.)

cases and tested them under the microscope, and if it was a true case of athlete's foot, we used Colusa Oil for treatment.

I first learned of Colusa Oil through a patient at this clinic who had a difficult psoriasis case.

Our clinical testing of Colusa Natural Oil lasted over a period of several months, beginning in April, 1942 and lasting until about June 9th.

"Q. In the course of this clinical test, in charity clinics, and in your laboratory, how many cases of psoriasis were tested with Colusa Oil by you?

"Mr. Zirpoli: I object to that as incompetent, irrelevant, and immaterial. This man is not competent to testify as to [81] psoriasis. I object to that.

"Mr. Gleason: We submit two things: first, this man had to study *Materia Medica*, and the diseases of the skin, and he is as competent as a practicing physician.

"The Court: The testimony shows that he kept the case history. What else did he do? The record is clear on that matter.

"A. I personally take the scrapings from the skin and subject them to the microscope and ascertain their constituents. Yes, in the course of these years of study I have told you about I did study skin diseases.

"Q. Did you study the literature and existing knowledge of psoriasis and eczema, and all other skin diseases?

"A. All doctors of science are very much in-

(Testimony of Dr. C. E. Von Hoover.)

terested in literature, and we read all the literature on psoriasis.

“Mr. Zirpoli: May I ask that go out?

“The Court: It may go out.

“Mr. Gleason: Is that a part of your training?

“A. It is a part of our required course.

“Q. After the oil was applied in the clinic, did you observe its effect upon the patient?

“A. Yes.

“Mr. Zirpoli: I object to his observation of the effect of a medication on a patient. He is not competent to testify to the effect of a medication on a patient.

“Mr. Acton: I don't like to argue after your Honor has ruled, but the law is, I think, your Honor, that a man may observe a person, and may know that a person is undergoing a certain type of medication, because he is undergoing it right in his own home, or in his laboratory.

“Mr. Gleason: Q. Did you see the Colusa Natural Oil applied to people who had psoriasis in this clinic? A. Yes.

“Mr. Zirpoli: Just a moment, I object to that. He is not competent to testify they had psoriasis.

[82]

“The Court: Objection sustained.

“Mr. Zirpoli: There are methods of proving those things by bringing proper witnesses.

“Mr. Gleason: Did you see that ointment, Doctor, applied to people who had skin diseases?

(Testimony of Dr. C. E. Von Hoover.)

“A. Yes.

“Mr. Zirpoli: The same objection. He is not competent to testify they had skin ailments.

“The Court: I will allow the question and answer to stand. Let us get through with this witness.”

I observed one hundred clinical tests from the Burchelmann Clinic and twenty-five from the U. S. Public Health by Dr. Beal. We have the clinic and Dr. Beal or Dr. Burchelmann is always present in the clinic all the time. We have but one clinic, a big clinic, where we put the material in, one hundred patients at a time. Dr. Beal, Dr. Burchelmann and myself are all present. We are always in the clinic together.

I remember the case of a Mr. McDonald, 809 South Alto Street, who is a fairly representative case. He had schizo-rubra eczema in his hand for about twenty years; that was treated with Colusa Oil.

“Mr. Zirpoli: I object to any testimony with relation to the character of the disease.”

Yes, I caused a photograph to be made of this patient's skin trouble. This photograph was then marked Defendants' Exhibit F for identification. This photograph is of the hand of J. R. McDonald; he was treated with Colusa Oil; this photograph was taken before starting treatments.

The witness was then shown another photograph which was marked Defendants' Exhibit G for iden-

(Testimony of Dr. C. E. Von Hoover.)

tification; that photograph shows Mr. McDonald's hand after completion of treatment with Colusa Oil.

I remember Mrs. A. Nelly of San Antonio, Texas; she was a [83] housewife, seventy years of age, who had a varicose ulcer.

"Mr. Zirpoli: I object to all of this testimony, first of all, as hearsay, as to her age, and his conclusion and opinion as to her having a varicose ulcer. He is not competent or qualified to testify to that. It may be the fact, but nevertheless, he is not the proper witness for it.

"Mr. Gleason: We submit, if the Court please, the statement that any man who has studied the *Materia Medica* and who has studied the diseases and taken the necessary and prescribed courses to obtain the degrees this man has, is competent to testify as to whether or not a given condition is a varicose ulcer, or eczema.

"The Court: I will allow him to answer with the hope we will get through soon.

"A. Mrs. A. Nelly is the varicose ulcer.

"The Court: How do you know?

"A. Well, from my experience, your Honor, in the laboratory, and as a doctor of science, and from the knowledge I have of *Materia Medica*, and dermatology and therapeutics, I determine that.

"The Court: By observation.

"A. By observation, yes sir.

"The Court: That is what you base your testimony on?

(Testimony of Dr. C. E. Von Hoover.)

“That is what I base my testimony on, yes sir.

“The Court: All right, proceed.

“Mr. Gleason: May I have this picture marked next in order for identification?”

Thereupon the photograph was marked Defendants' Exhibit H for identification.

“Mr. Zirpoli: May I ask one other foundational question?

“The Court: You may.

“Mr. Zirpoli: You are not a pathologist, are you?

“A. No sir, I am not a pathologist.

“Mr. Zirpoli: Now I object to his conclusion as to the [84] woman having a varicose ulcer on that further ground.

“The Court: I will sustain the objection and instruct the jury to disregard the testimony.

“Mr. Gleason: May we have an exception?

“The Court: You may have an exception.

“Mr. Gleason: In any event, Mrs. Nelly was suffering from a skin ailment? A. Yes.”

I am now looking at Defendants' Exhibit H for identification which I recognize as a photograph of Mrs. Nelly's leg with this invasion in it, if you want to call it that, if I am not permitted to call it a varicose ulcer; she was treated with Colusa Oil in the course of my clinical testing, which I previously have described. I personally observed and watched the case, and on the seventeenth day she returned to the clinic and I caused another photograph to be made to show the progress.

(Testimony of Dr. C. E. Von Hoover.)

At this point, Mr. Gleason asked another photograph be marked Defendants' Exhibit I for identification. This photograph, Defendants' Exhibit I for identification, shows the right foot and part of the leg of Mrs. Nelly, taken seventeen days after her first admission and treatment in the clinic.

Thereupon, Defendants' Exhibits H and I for identification were admitted, in evidence, over objection, as Defendants' Exhibits H and I.

Thereupon, Defendants' Exhibits F and G for identification were offered in evidence and were admitted, over objection, as Defendants' Exhibits F and G.

Yes, approximately one hundred twenty-five cases of skin diseases of various kinds were treated in this clinical testing laboratory, and Colusa Oil was used in these treatments.

"Q. Were any cases of psoriasis treated in that clinical testing laboratory?

"Mr. Zirpoli: I object to that; he is not competent to [85] testify as to any cases of psoriasis, or their treatment.

"The Court: Objection sustained."

I have had occasion in the course of my professional training at various colleges and in my practice to study skin diseases, and particularly psoriasis; I have studied dermatology; I have had occasion to study the eczema family of which there are forty types. I have studied varicose ulcers. As a result of my training in dermatology, and as a result of clinical testing work in my professional

(Testimony of Dr. C. E. Von Hoover.)

practice, I can identify these various diseases when I see them.

“Q. You tested, as I remember, one hundred twenty-five cases. How many cases of psoriasis were included in that group?

“Mr. Zirpoli: I object to that, your Honor, again, as this man is not competent to testify to that.

“The Court: If he knows, he may answer.

“A. Twenty.

“Mr. Gleason: How many cases of eczema, approximately?

“Mr. Zirpoli: The same objection.

“The Court: The same ruling.

“A. Forty, altogether.

“Mr. Gleason: How many cases of athlete's foot?

“A. Well, I believe eleven or twelve cases.”

Yes, my wife suffered from a skin disease; she had a fungus infection from the ground from working in the yard. It attacks the nails; it is caused from the trichophyton that gets imbedded into the skin and works its way in and causes itching; it turns the nails dark. I saw an opportunity of trying out this Colusa Oil and I used it on her.

Here Mr. Gleason asked that a photograph be marked “J” for identification, and another be marked “K” for identification, and they were so marked by the Clerk.

The witness was then shown Defendants' Ex-

(Testimony of Dr. C. E. Von Hoover.)

hibit J for [86] identification, and testified it was a photograph of the hands of his wife, Mrs. C. E. Von Hoover.

I caused the photograph to be taken and it depicts the condition of Mrs. Von Hoover's hands as they were about the middle of March, 1942, before I used Colusa Oil in their treatment. It was a hard case, taking weeks to recover. Yes, the Colusa Oil cleared the hands; there was no sign of the infection.

The witness was shown Defendants' Exhibit K for identification, and testified: this is the photograph of the hands of my wife after concluding four weeks' treatment with Colusa Oil, and it accurately portrays the condition of her hands at that time.

Defendants' Exhibits J and K were then admitted in evidence, over objection, and marked Defendants' Exhibits J and K.

Yes, I observed the use of Colusa Natural Oil on a man named Mercurlin, who met a premature death. He was a deputy sheriff.

"Q. What skin disease did he have, Doctor?

"Mr. Zirpoli: I object to that on the ground that this witness is not qualified to testify to that.

"The Court: Objection sustained.

"Mr. Gleason: Q. Do you know what disease he had?

"Mr. Zirpoli: The same objection.

"The Court: The same ruling.

(Testimony of Dr. C. E. Von Hoover.)

“Mr. Gleason: Q. He had a skin disease, did he, Doctor? A. He did.

“Q. On what part of his body?

“A. On the right arm.

“Mr. Zirpoli: I ask that the answer go out. He is not competent to testify.

“Mr. Doyle: We will take a ruling of the Court.

“The Court: Proceed.”

Scaling appeared and then blood exuded. I observed those conditions; Colusa Oil was used in treatment. No, I did not [87] observe the results of the use of this oil in this case because he met a premature death, being killed by a lawyer.

“Mr. Gleason: Q. What is your opinion, Doctor, based upon the many tests made by you in your laboratory and in these clinics, and based upon your training as a pharmacologist, and based on your studies of the science of pharmacology, what is your opinion as to the efficacy of Colusa Oil in the treatment of psoriasis?

“Mr. Zirpoli: I want to interpose an objection, your Honor.

“The Court: Objection sustained. Proceed.

“Mr. Gleason: Note an exception, if your Honor please.

“The Court: Let an exception be noted.

“Mr. Gleason: Q. Doctor, what is your opinion, based on the tests that you have made, and on your training as a pharmacologist, your observa-

(Testimony of Dr. C. E. Von Hoover.)

tions of the use of Colusa Natural Oil on persons suffering from skin diseases, what is your opinion as to the efficacy of the product in the treatment of such diseases?

“Mr. Zirpoli: I want to make my objection for the record, that this man is incompetent to testify to the efficacy of it.

“The Court: I am going to try to get through with this witness. He may answer it.

“A. Yes, it is an effective treatment.

“Q. What did you observe as to what it accomplishes, Doctor?

“Mr. Zirpoli: The same objection. This is an incompetent witness.

“The Court: He may answer.

“A. The results were good.”

I found this oil had penetrating powers by rubbing the epidermis briskly for two minutes, and it will show under the microscope on the follicles of the hair, and by this I found it penetrates.

If a homeopath consults me as a pharmacologist, naturally I resort to the homeopathic pharmacopoeia; or if the allopath [88] consults me, I resort to the allopathic pharmacopoeia for the doses.

“Q. With respect to these homeopaths, have you had occasion to check and determine what the homeopaths describe as a dose of sulphur?

“A. For the homeopath pharmacologist, you see, the percentage, the metric system isn't used by the homeopaths. They use a potency in the Ma-

(Testimony of Dr. C. E. Von Hoover.)

teria Medica, which is equivalent to the metric system, or percentage, and as to grains. For instance, I may say, if you want gelsenium, or sulphur, the homeopath ointment would be a 12 potency, equal to about 1/10 of a grain, or a per cent. If it is a question of allopathy, in the regular school of medicine, there is your Pharmacopoeia that says two per cent is effective. We must say, as pharmacologists, as to both schools that consult us. Therefore we have two books."

Yes, based on my training as a pharmacologist, and as a man who tests drugs, and based upon my study of that subject, and based upon my observation of the use of Colusa Natural Oil, it is my opinion that this Colusa Oil is efficacious to relieve discomfort and pain, and that it is efficacious to inhibit the spread of skin irritation over the normal skin surface.

Then ensued a discussion between Court and counsel as to the length of the remainder of the trial. The Court ordered each side to state the names of the remaining witnesses to be called and the general subject matter of their testimony. This was done. An adjournment was then taken to Friday, June 26, 1942.

Trial was resumed on Friday, June 26, 1942.

Counsel for defendants thereupon made the following statement to the Court, viz:

(Testimony of Dr. C. E. Von Hoover.)

“Mr. Acton: If your Honor please, before we conclude the direct examination of this witness, I want to take just not to exceed four or five minutes’ time this morning in giving the Court the benefit of my research in the law library last night on the [89] qualifications of this man as an expert, and to call to the Court’s attention three cases where men not physicians and surgeons were allowed to testify as experts regarding the applications of various substances to the human body.”

Both sides then argued this point, and thereupon the witness Von Hoover testified further as follows:

At the end of my three months’ clinical investigation of Colusa Oil to determine the efficacy of this preparation, I prepared a report which covered both the animal and human therapy; I personally prepared the clinical findings and report and I have that report here with me.

At this point, the Court permitted Mr. Zirpoli to ask questions of the witness who thereupon testified:

I prepared these reports on the 28th day of May, 1942; they were prepared by me; I referred to the reports of doctors and physicians in our clinic; we make up our case record which is signed by the physician.

(Testimony of Dr. C. E. Von Hoover.)

Direct Examination

(Resumed)

I personally observed each and every case referred to in the report; and I was present in the clinic when this oil was administered to the patients. This investigation was started around April 1st and completed May 28th. At the time of completion of the investigation, I sat down and typed this report covering the results of it; I relied only on the case records, the actual facts there of the patient; these records are kept in our clinic; these case records have been made available to the Federal Food and Drug inspectors in connection with this case; ever since the adoption of the Food and Drug Act, these inspectors have examined our records. This report is based on my knowledge of the cases referred to.

Mr. Zirpoli again was permitted to examine the witness, who continued: [90]

My secretary and I wrote these case reports in the presence of the physician, and I personally examined each of the cases on which we have a record and on every one of the days the patient appeared. I was with the physician when these reports were made. I am not a medical doctor; I am a pharmacologist; I rely on the medical doctor in the matter of treatment.

Then ensued an argument between counsel.

“Mr. Gleason: We are going to ask this witness to testify from a memorandum made by him at a time when the facts were fresh in his mind as

(Testimony of Dr. C. E. Von Hoover.)

to the number of patients, their ages, duration of treatment, and the physical facts with respect to it in all of these various diseases, and we submit the code section—I think it is 2047—permits the witness to use memorandum records——

“Mr. Zirpoli: Yes, I know that.

“Mr. Gleason: (Continuing): ——if the memorandum was made at any time when the facts were fresh in his memory. And the law goes further. We have the authorities on it to the effect that the witness can even copy an original memorandum and bring the copy to court and use the copy for the purpose of refreshing his recollection.”

“Mr. Gleason: Q. Dr. Von Hoover, do you have in your possession at the present time an original memorandum made by you of the facts as to your observations of these various diseases, psoriasis, eczema, athlete’s foot, impetigo, varicose ulcers, poison ivy or oak, and hemorrhoids, as to which you and your associates made a clinical investigation? A. Yes.

“Q. And that report was prepared by you, was it not? A. Yes.

“Q. And are the facts there set forth in that report, facts that you personally observed and ascertained in this clinical investigation?

“A. Yes.”

At this time the report was marked Defendants’ Exhibit L for identification. [91]

(Testimony of Dr. C. E. Von Hoover.)

DEFENDANTS' EXHIBIT L FOR
IDENTIFICATION

6-26-42

CANINE MANGE (FOLLICULAR)

To Whom It May Concern:

Follicular mange is a serious problem in canine dermatology. It masquerades under such names as chronic eczema, "skin trouble," "summer rash," and is also referred to as "red mange," demodetic and "incurable mange". These observations and suggestion is an attempt over a period of many years to find a satisfactory treatment for this troublesome skin diseases.

Cause: A mite microscopic in size, *Demodex Folliculorum*, is the cause of follicular mange. The mite lodges in the hair follicles and sets up an acute condation through the toxins, secretions and excretions. The hatching of eggs and the development of young mites to the mature mites attacking the hair follicule with a resultant irritation.

Symptoms:

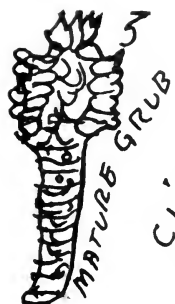
In active case the outstanding symptoms are bare spots, constant scratching and biting of the skin, unpleasant and fetid odor. Follicular mange must not be mistaken for Stuttgart's diseases, *necrobacillosis* and *streptococci* or *staphylococci*. The skin becomes thickened and wrinkled. Usual sites of attack are the forelegs, axillae, abdomen and medial

(Testimony of Dr. C. E. Von Hoover.)

surface of the thighs and also will disclose pimples, pustules and inflamed areas.

Follicular mange must be confirmed by the Microscope. Here are the five living stages of *Demodex folliculorum*, from the egg to the matures "grub":

As Seen and detected thru the microscope:



CLINICIANS
IN VIVO



(Testimony of Dr. C. E. Von Hoover.)

Treatment:

In order to bring about a cure a deep penetrating external must be used.

Must be well rubbed into the skin so that the germicidal or parasicidal will penetrate to the hair follicles and destroy both the egg and mature grubs.

Good results has been obtained by the writer with an oil-sulphonated-hydrocarbons known as "colusa." It relieves scratching quickly. Dogs will not lick where applied. The results experienced by the writer in this hospital is of good results and to the extent that I am encouraged to continue an extensive tests which is under routine at this writing.

Editor note: Cats are first to show toxic effects and most phenols applied results quick death.

BROADWAY VETERINARY HOSPITAL.

Colusa oil penetrates quickly and releives tormenting itching which prompts dogs to continue to scratch, especailly if placed in warms rooms.

When Colusa oil contacts the eggs or the mature Demodex folliculorum it kills both types instanter.

I did not find a single case of toxicity in the application of Colusa oil. The expereinces herein are the results of 20 successful cases treated. *Cats with mycosis ears (canker ear'') successfully treated 5.

Since that the results was gratifying I am conducting a further extensive tests with the hope that a valueable treatment might be perfected and to

(Testimony of Dr. C. E. Von Hoover.)

pass on to the profession this notice that they might experience the same good results and effects cures in this stubborn skin malady.

(*Non toxic)

J. W. BURBY, D.V.S.,

Director

(Former Major U. S. Army
Veterinary Corps.)

Broadway Veterinary Hos-
pital & Clinic

San Antonio, Texas.

Member: American Veterinary Medical As-
sociation. State Association. County & State
Veterinary officer.

Microscopic & Laboratory:

C. E. VON HOOVER,
M.S.D.Sc.

Subscribed and Sworn to Before Me, this 9th
day of June A. D. 1942.

J. REYNOLDS FLORES

Notary Public,

Bexar County, Texas.

[Notarial Seal]

“Mr. Gleason: I will ask that a report entitled,
‘A report of the clinical results of Colusa’ be
marked for identification as the next in order.”

Whereupon the document was marked Defendants’ Exhibit M for identification.

(Testimony of Dr. C. E. Von Hoover.)

DEFENDANTS' EXHIBIT M FOR
IDENTIFICATION

6-26-42

A REPORT OF THE CLINICAL RESULTS
OF COLUSA

This report is the results of an investigation with Colusa oil for external use in dermatology, Colusa Oil Capsules for oral administration and Colusa Ointment for hemorrhoids.

The following groups are those treated and as follows:

Group No. 1: Psoriasis:

20 cases of psoriasis: 15 males ages from 22 to 56: Duration: From one to four years. Method and treatment: Colusa External Oil applied by well massaging into the psoriasitic lesions twice daily, usually morning and night and allowed to dry well before retiring or dressing of wearing apparel. 16 patient of Group No. 1 cleared of all lesions completely in 30 days. 4 cases of this group has responded to this treatment to the extent that seventy-per cent of the lesions or psoriasitic sites having disappeared and continued treatment for the remaining are now being carried out. The results in each case is most gratifying.

Group No. 2: The Eczemas:

40 cases of Eczema. 30 males from 11 to 60 years of age. Duration: from a year to five. 6 Females: from 1 year to 50, and 4 infants, 2 males and 2 fe-

(Testimony of Dr. C. E. Von Hoover.)

males, from 1 whose duration was from birth, 1 8 mo of age and 2 of which are 11 and 13 month of age.

I agree with Stelwagon*¹ that eczema is eczema, however, whatever its variety, and the various type names should not be allowed to confuse. Eczema is the cause of the majority of dermatologic cases.

All of the above group (1) was clear of all lesions in from 3 weeks to a full month, save 1 male and 2 female adults who has improved to such extent that fifty per cent of the lesions present when treatment first began has disappeared. Prognosis of these 3 case good for recovery. Method of treatment the same as used in Group No. 1.

Group No. 3: Epidermophytosis ("athlete's foot")

11 cases of epidermophytosis: 6 males; 5 females: 7 cases acute and 5 chronic. Epidermophytosis is divided into 2 stages; Acute and chronic (ref. Semon^{2*} Atlas of the Commoner Skin Diseases). Cures were effected in the acute stages in a period of 8 to 14 days and in chronic cases 3 weeks. All of the above group (save 1 acute who did not return for treatment) was dismissed completely cured. Method of treatment: Colusa well rubbed in the de-

(1*) Henry D. Stelwagon, M.D.Ph.D. Prof. Dermatology, Jefferson Med. College "Treatise of the Skin" (W. B. Saunder Co. Pub.)

(2*) Henry C. G. Semon, M.A.M.D.Ph.D.M.R.C.P, Royal College, London "Atlas of the com. Skin Diseases (Pu. Wm. Wood & Co.)

(Testimony of Dr. C. E. Von Hoover.)

nuded sites twice daily and shoes worn when patient appeared for treatment order discarded, fresh white hose worn daily with new shoes.

Group No. 4: Impetigo

8 cases of impetigo. 6 male children ages from 10 to 14. 2 Male adults ages, 48 53. Ova of the head lice present in all of the children and so confirmed by the laboratory. In both cases of the adults male the ova was absent and no pediculi, therefore confirmed as streptococcal.

Desired results in all of the above was enjoyed in from 8 to 14 days, save one child who did not report back to the out-patient service for treatment. Cures in 7 case confirmed.

Method of Treatment: Affected area sponged with Colusa oil every 4 hours during the day.

Group No. 5: Varicose Ulcers:

3 case of senile leg ulcers. 2 females and one male. Their histories of duration 3 years in 2 case and 1 year in one.

Patients order to remain off their feet. Gauze over cotton pad well saturated with Colusa and applied over ulcer site. This therapy changed to fresh dressing morning and night and in between time an occasional dash of Colusa to keep the dressing wet. This Method of treatment resulted in complete healing of all three case in a month time.

(Testimony of Dr. C. E. Von Hoover.)

Group No. 6: Poison Ivy or Oak.

6 adults, three males and 3 females and 2 small children who contracted poison ivy while on a week end picnic. Hands and faces of the infants was the sites of attack. Of the adults the forearms, shoulders and in the eye brows. Burning and tormenting itching was the major complaint of the adults and in the infant children the cry from pain was continued. In these infants wet compresses of Colusa was applied and in very short period of time the pains subsided and the infants enjoyed sleep. Complete recoveries in all of the above case. Same method of treatment instituted on the infants was carried out on the adults. The adults stated that the application of Colusa brought about a cooling effects and subsided itching instantaneously. Cures effected in an average of 8 days.

Group No. 7: Hemorrhoids and Pruritus Ani:

3 cases of pruritus ani in males responded to treatment in a week with Colusa Hemorrhoid Ointment. Well massaged around anus.

11 cases of hemorrhoids. 6 males and 5 females (all adults). Colusa Ointment brought relief in all cases from pain, three of these cases revealed relief from pain only and was referred to the surgeon. It can be said that Colusa Ointment is a palliative relief for hemorrhoids, and not a cure.

Colusa Capsules was given in Groups No. 1, 2 and No. 7 only.

(Testimony of Dr. C. E. Von Hoover.)

Toxicity, Intolerance and "Flareups":

Not in a single case of this clinical groups did I meet with toxic, bad effects, intolerance or flareups as found in the phenols.

Bad Features:

Colusa oil will stain clothing, linens and household effects, however, the dye effect therein is of thearpuetic value.

Good Features:

Colusa Oil may be used near the eyes without danger, thereby, permitting application to the face so important in most skin diseases.

It releives itching quickly.

It is non-irritating.

A little of the oil covers large areas.

Soothing to raw and denuded lesions and effected areas.

Melts at body heat, releasing its influence and the thearpuetic agents it contains. Fast penetration. Easily massaged into the skin.

Formula:

A liquid containing sulphonated hydrocarbons as a base and many other unknown elements. Nature carefully blended into the base of this oil sulphonated hydrocarbons and other elements that can be taken apart in our laboratory and can not be put back into a complete formula of all the elements therein. Such factors as viscosity, specific gravity and perfect blending into an oil of high thearpuetic

(Testimony of Dr. C. E. Von Hoover.)

value the many valueable agent can in my opinion be done by nature as it has displayed in the oil.

Therapuetic Value:

The results of the clinical patient herein is suffice to establish gratifying therapuetic value. Colusa forms epithelium in an extremenly rapid manner.

It convinced me in this clinical test that it is an improvement over former methods used up to this time.

Control:

Each patient presented himself or was seen in the home once a week, for treatment and clinical observation until dismissed from further treatments.

Conclusions:

The results of this clinical and laboratory investigation should encourage other physicians to make further scientific and clinical tests in order that a new remedy be brought to the attention of physicians who have daily skin disease problems.

This article is not to be used in any un-ethical manner, whatsoever.

A. BERCHELMANN, M. D.,
Clinician.

Member: American Medical Association. Bexar County Medical Society, Selective Service Administration.

(Testimony of Dr. C. E. Von Hoover.)

Former: House Physician Santa Rosa Hospital,
City Health Officer, San Antonio, Texas. Capt.
U. S. Army Medical Corps.

C. E. VON HOOVER,

M.S. Dsc. Phd.

Chemistry and Laboratory
and Technical Assistant to
the Clinician.

Subscribed and Sworn to before me this the 28th
day of May A. D. 1942.

[Seal]

J. REYNOLDS FLORES

Notary Public,

Bexar County, Texas.

“Mr. Gleason: I will ask that a report entitled,
‘Some clinical experiments with a sulphonated
hydrocarbon oil’ be marked for identification.”

Whereupon the document was marked Defendants’ Exhibit N for identification.

“Mr. Gleason: Q. You have given me several
reports, Doctor. Defendants’ Exhibit L for identification,
without stating its contents, is what?

A. It is my report.”

I prepared it; that is my report of the results
of the application of Colusa Natural Oil to the skin
of animals; associated with me was Dr. Burby, a
veterinarian.

The witness was again questioned by Mr. Zirpoli.

I am not a veterinarian.

(Testimony of Dr. C. E. Von Hoover.)

“Mr. Zirpoli: Q. And this is a veterinarian’s report?

“A. You see my name on the other side as the laboratory man, on the other side there, the man that made the findings in the presence of the veterinarian. He couldn’t make those tests because he is not qualified in bacteriology.

“Q. You made the microscopic and laboratory tests? A. That is correct.

“Q. And he made all the veterinarian tests with relation to treatment?

“A. I am not a veterinarian. I do not apply medication. In that case I did; it did not involve the practice of medicine.

“Q. This report is predicated upon the experiments conducted upon the animal?

“A. That is correct.

“Q. Made by Dr. Burby?

“A. And myself. [92]

“Q. But Dr. Burby did the actual administration?

“A. No, I administered to some dogs the application of oil in his presence.

“Q. This purports to be his conclusion as a veterinarian, too, does it not?

“A. Canine dermatology is the practice of the veterinarian, and, naturally, he would sign as the veterinarian, and I as the scientist, the micrologist.

“Mr. Gleason: Q. I am going to ask you to

(Testimony of Dr. C. E. Von Hoover.)

refer to Defendants' Exhibit L for identification and ask you if that document refreshes your recollection as to facts observed by you in these clinical tests on animals as to the therapeutic value and power of the Colusa Natural Oil? A. Yes.

“Q. Please state briefly the facts observed by you in these clinical tests on this animal therapy as to the results of the use of Colusa Natural Oil on skin diseases of animals. And, Doctor, confine yourself to the facts that you know of your own knowledge and do not read any of the opinions if they are opinions of Dr. Burby.

“Mr. Zirpoli: I want to make this objection, your Honor. He is asked to testify as to the effect of the application of this oil, which calls for his opinion and conclusion as a veterinarian.

“The Court: Objection sustained.

“Mr. Acton: Will your Honor allow us an exception to that ruling?

“The Court: Note an exception.

“Mr. Gleason: Q. Doctor, in the practice of your profession as a pharmacologist and your work for these firms that you mentioned yesterday, including the Goodman Laboratories and the rest of them, as their consultant, do you in the practice of your profession resort to animal therapy to test the efficacy of drugs and preparations? A. Yes.

“Q. Is that a part of the ordinary practice of the ordinary pharmacologist?

“A. That is the practice.

(Testimony of Dr. C. E. Von Hoover.)

“Q. I will ask you to state, Doctor, the facts that you observed, [93] in your clinical examinations; that is to say, this animal therapy, from the use of Colusa Natural Oil upon the skin diseases of dogs and cats used in this animal therapy.

“Mr. Zirpoli: May it please the Court, I submit that the question is identical in different terms and the objection is made exactly as it was made to the last question.

“Mr. Doyle: This question asks for the knowledge of the witness.

“The Court: The objection will be sustained.

“Mr. Acton: May we have an exception to the ruling?

“The Court: Note an exception.

“Mr. Zirpoli: May I have the record also show that my objection is on the ground that it is irrelevant and immaterial to the case.

“The Court: Let the record so show.

“Mr. Gleason: Q. Doctor, I will ask you to refer to Defendants' Exhibit M for identification. Did you personally prepare that report?

“A. Yes.

“Q. What is it?

“A. It is a report of the clinical results of oil on the physiological tests on human patients.

“Q. Those are the one hundred and some-odd patients you mentioned yesterday afternoon?

“A. This contains a hundred, this report.”

This report contains the essential facts which I

(Testimony of Dr. C. E. Von Hoover.)

observed in the making of these tests with Colusa Natural Oil on those one hundred patients.

“Q. Does this report, Doctor, contain a statement of the facts observed by you in these clinical tests made by you and your associates in your presence, on human beings, to ascertain the therapeutic value of Colusa Natural Oil in the treatment of psoriasis, athlete’s foot, impetigo, varicose ulcers and hemorrhoids? A. Yes.

“Q. And also acne? I omitted acne.

“A. No, I don’t believe we [94] tested it on acne.

“Q. You are right, Doctor, You did test for poison oak and ivy? A. Yes.

“Q. Now then, will you, by reference to this report——

“Mr. Zirpoli: May I ask some foundational questions before I interpose any objections? This report also purports to be the report of Dr. A. Berchermann, M.D., clinician, is that correct?

“A. Yes.

“Q. And this report also purports to show the effects and results secured by the treatment of these human persons by the physician and surgeon, is that correct? A. Yes.

“Mr. Zirpoli: Then, your Honor, I submit that the witness is incompetent to testify as to the facts herein contained on the grounds that it is not exclusively the information of the witness, and on the further ground that it contains hearsay testimony

(Testimony of Dr. C. E. Von Hoover.)

predicated upon hearsay facts of a physician and surgeon, a person other than himself, and on the further ground that he is not competent as a physician and surgeon to testify as to the effect and results.

“The Court: Same ruling. The objection will be sustained.

“Mr. Acton: May we be allowed an exception to the ruling?

“The Court: Note an exception.

“Mr. Gleason: You testified yesterday as to your opinions and conclusions as to the efficacy of this drug in the treatment of these various diseases. Did you investigate in these tests on human beings to determine the toxic effect of the preparation?

“A. I make the toxic test before it is submitted to clinicians. That depends on me.

“Mr. Zirpoli: We will admit that it is not poisonous, counsel.

“Mr. Gleason: Not toxic?

“Mr. Zirpoli: Yes, poisonous; toxic means poisonous, I [95] think. There is no issue as to that.

“Mr. Gleason: Q. And in the cases personally observed by you in these clinical tests, in any of these cases did you observe any unfavorable or injurious results from the use of Colusa Natural Oil on these patients?

“Mr. Zirpoli: Objected to as calling for an opinion and conclusion, your Honor, of this witness, who is not a physician and surgeon.

(Testimony of Dr. C. E. Von Hoover.)

* “Mr. Gleason: That is his business, if your
Honor please, and profession; he tests drugs.

• “The Court: The objection will be sustained.

“Mr. Acton: May we note an exception to that ruling?

“The Court: Note an exception.”

The witness then testified on cross examination:

I am a Doctor of Science; I am not a physician and I am not a veterinarian; I operate a clinical investigation agency; I do bacteriology; that is incorporated in my Doctor of Science degree. I am permitted to practice bacteriology. Colusa Oil was never tried out as a germicide; we did not make any germicidal test. In determining if a product has germicidal properties, I would submit it to the staphylococci germ test, the streptococci test; to bacteriological tests.

Yes, reference was made yesterday to the United States Pharmacopoeia No. 11. We use it in allopathy; we use the Hemeopathic Pharmacopoeia when serving a homeopathic manufacturing chemist. We rely on the pharmacopoeia absolutely; I wouldn't say it is our Bible, it is our law.

“Mr. Zirpoli: Q. And that is the one used for your studies in Europe? A. Yes.”

The United States Pharmacopoeia is made up of the findings of pharmacologists, and through practice over a period of ten years, and in ten years the pharmacologists, leading druggists, we say “pharmacists”, all the men in the science field of

(Testimony of Dr. C. E. Von Hoover.)

pharmacology meet and committees are appointed by leading pharmacologists to define the rules of practice of prescription [96] and dispensation, of drugs and chemicals and all that pertain to the treatment of human ills are incorporated into that Pharmacopoeia. The Pharmacopoeia is prepared with the authority of the United States Government.

With respect to sulphur ointments, there are various sulphur ointments. The allopathic formula generally used for sulphur ointment is an ointment of five per cent and ten per cent sulphur and some cholesterin base or refined petroleum base. I think that is in the Pharmacopoeia; we use five and ten per cent sulphur, and we use a cholesterin base; no other active ingredients; cholesterin 90, and five per cent sulphur; five and ten are in the United States Pharmacopoeia, but we make several; we came out with several sulphur ointments with lesser ingredients than are in the Pharmacopoeia. The generally accepted ointment has five per cent sulphur; that is in the United States Pharmacopoeia.

“Mr. Zirpoli: Q. You tell us the generally accepted ointment has five per cent?

“A. Five and ten.

“Q. This is the United States Pharmacopoeia, isn't it? A. Yes.

“Q. No question about that?

“A. No question.”

At this point, Mr. Zirpoli asked that a book be marked Government's Exhibit 14 for identification.

(Testimony of Dr. C. E. Von Hoover.)

“Mr. Zirpoli: Q. Just tell me what is the formula for tincture of iodine.

“Mr. Gleason: You mean the allopathic formula?

“Mr. Zirpoli: He is a pharmacologist; he is qualified.

“Mr. Gleason: You mean the allopathic formula?

“Mr. Zirpoli: Allopathic, yes.

“A. I am not a chemical engineer. If you are speaking about extracting and making up from the iodine basis, I am not——

“Q. How much iodine is there in the tincture of iodine?

“A. Tincture? Wait just a moment. I believe—let’s see; in tinctures—extract of iodine you refer to don’t you? [97]

“Q. I am talking about the tincture of iodine. That is the common, ordinary name, tincture of iodine, as it is set forth in the Pharmacopoeia.

“Mr. Gleason: We object to that statement of counsel, if the Court please.

“Mr. Zirpoli: I am asking him if that is a fact. I think I am entitled to ask him. Isn’t that the common, accepted name given in the Pharmacopoeia of the United States, Volume II, tinctura Iodi or tincture of iodine?

“The Witness: Yes.

“Mr. Zirpoli: Q. All right. Now, tell me, how much iodine is in it?

(Testimony of Dr. C. E. Von Hoover.)

“A. I believe—let’s see; tincture of iodine is a colloidal extract.

“Q. What is the percentage?

“A. Let me see; I would have to refresh my memory. Those things grow old on me.

“Q. In other words, you don’t recall at this time? A. No.

“Q. Can you tell me what gluside is?

“Mr. Gleason: We object to that on the ground that it is incompetent, irrelevant and immaterial.

“Mr. Zirpoli: (Spelling) G-l-u-s-i-d-e.

“The Court: He may answer.

“A. Gluside?

“Mr. Zirpoli: Q. Yes.

“A. You mean one of the glocoses?

“Q. I am asking you. You are asking me what I mean. Can you tell me what gluside is?

“A. It is one of the sugars, isn’t it?

“Q. This isn’t a quiz program.

“A. You are expecting me to answer something I haven’t been through——

“Q. You are a qualified pharmacologist? [98]

“A. I am not qualified to quote everything from a book, any more than you can quote all the law.

“Q. By the way, does Colusa Oil appear anywhere in the Pharmacopoeia?

“A. No, it does not.

“Q. Does it appear in the Homeopathic Pharmacopoeia? A. No, it does not.

(Testimony of Dr. C. E. Von Hoover.)

“Q. It does not appear in either one?

“A. No.”

No, follicular mange is not a disease of man.

The witness testified further on redirect examination:

We made no test of Colusa Oil for germicidal properties; most skin diseases are not from germs; they are parasital, either from fungus or external causes.

Follicular mange is not a disease of man; we made the examination on these dogs with the oil to determine the parasiticial efficiency of the oil—to see if it is a parasiticide. In making these tests, I actually put scrapings from the skin disease of the dog under the microscope and observed this oil destroy the parasites. We removed the hair follicles, the root of the hair, they are attached to the root of the hair, they are immersed in the oil and were put away. Our investigation covered the full range starting with the egg and ending up with the full-grown grub.

The witness further testified on recross examination:

“Mr. Zirpoli: Q. What do you mean ‘farasital’? Tell us what you mean.

“A. A ‘farasite’ is——

“Q. You mean ‘parasite’, don’t you?

“A. I am a Southern gentlemen and my pronunciations are not like you gentlemen of the East, and that thing I do not speak——

(Testimony of Dr. C. E. Von Hoover.)

“Q. Counsel said the same thing; I want to know what you are talking about.

“A. My pronunciation is bad.

“Mr. Zirpoli: Counsel said the same thing.

“Mr. Gleason: I believe I OK'd the mistake.

“The Witness: Another thing I want to tell you. I was [99] overseas and I had a shot in the mouth, and my pronunciation is bad from the last war.

“Mr. Zirpoli: I apologize if it is a question of pronunciation. You mean parasite?

“The Witness: Certainly, parasital.

“Mr. Zirpoli: Q. What is a parasite?

“A. It isn't a germ family; it doesn't belong to the germ family.

“Q. It is not a germ?

“A. I wouldn't classify it as one of the germ family; it is, you might say, of a vegetable origin.

“Q. It is of vegetable origin?

“A. It is probable, but in follicular mange we don't know, because we don't know how the mite ever got on the dog. The *Demodex Folliculorum* attacks the dog.

“Q. In your opinion, all parasites are of vegetable origin?

“A. No, not all are of vegetable origin. This particular one we classify as of vegetable origin.

“Q. How about athlete's foot?

“A. It is fungus, *Trichophyton microsporum*.

“Q. Do you know whether that is vegetable or animal? A. That is vegetable.

(Testimony of Dr. C. E. Von Hoover.)

“Q. Do you know what schizomycetes are?

“A. That is animal.

“Q. That is one of the primary classifications, isn't it? A. Fungus.

“Q. You say it is animal, and a moment ago you told us that fungi are vegetable.

“A. Fungus is a growth. It is from the earth. It could be classed as vegetable. Certainly it is vegetable. As I told you, I am not a bacteriologist; I only make these investigations of my own accord.

“Mr. Zirpoli: That is all.

“Mr. Gleason: That is all, Doctor.”

MRS. OPAL CAMERON

was then called as a witness on behalf of the defendants and testified as follows: [100]

I reside in Berkeley; I formerly suffered from eczema; I had this disease on and off from the time I was a youngster; I have treated with doctors all my life; I had to wear rubber gloves with cotton gloves underneath. The doctors did not cure me; it keeps coming back at intervals. I heard about Colusa Natural Oil the last attack I had and used it and it cleared up the condition. This disease was accompanied by itching and was very distressing; I couldn't put my hands in water. Yes, sir, this Colusa Oil gave me relief as to the itching; it completely went away within one week. I do not have to use gloves now in my work.

(Testimony of Mrs. Opal Cameron.)

On cross examination the witness testified:

I used this oil early this Spring, in March of this year. [101] Yes, I had this disease off and on for a period of time.

MRS. WILMA WELCH

was then called as a witness on behalf of the defendants and testified as follows:

I reside in Emeryville; I formerly suffered from athlete's foot, which affliction was accompanied by itching; I would say it was a mild case. I used Colusa Natural Oil and obtained instant relief; it cured the condition in three or four treatments.

On cross examination the witness testified further:

I reside in Emeryville. This itching was between each little toe.

ARTHUR W. SCOTT

was then called as a witness on behalf of the defendants and testified as follows:

I am a welder in the shipyards; I was formerly employed by the Empire Oil and Gas Company in Colusa where Colusa Natural Oil is produced. I was engaged in the production of the oil; while working I sustained some burns; it was in '39; I had done some welding and got a little careless and

(Testimony of Arthur W. Scott.)

picked up hot irons and got severe burns on four fingers of my right hand, and it made a terrible scar. The following day I got a burn on the other hand, and they brought some of this oil and I just reached over and put my hand in that oil, and in half an hour I just forgot about that hand entirely; it never blistered or anything; one burn was equally as bad as the other; the oil had a beneficial effect on my hand. I have experienced many burns in my trade as a welder and have used various ointments; I have been a welder for ten years; I have used plain lubricating oil for burns when I couldn't get anything else. I have used Unguentine for such burns.

"Mr. Gleason: Q. State, then if you will, briefly, whether the use of Colusa Natural Oil gave you the same or better relief than the Unguentine had previously given you.

"Mr. Zirpoli: I make the same objection. We don't know [102] anything about Unguentine.

"The Court: Is that all from this witness?

"Mr. Doyle: He hasn't answered the question.

"The Court: The objection will be sustained.

"Mr. Doyle: Exception."

The witness continued:

I have used Colusa Oil on cuts; I cut my ankle, cut the skin clear down to the bone and all I did was to put some Colusa Natural Oil on it and wrap it up; it remedied it; I took the bandage off in

(Testimony of Arthur W. Scott.)

three days and it was all healed up; I suffered no infection whatever.

“Mr. Gleason: Q. You operated these wells in Colusa County for the production of what we term ordinary crude oil. How many barrels of water are pumped in the pumping of these wells, or how many gallons of water in order to get one gallon of this medicinal oil?

“Mr. Zirpoli: We object to that as irrelevant and immaterial as to the process of how this is manufactured.

“The Court: Objection sustained.

“Mr. Gleason: The only purpose, if the Court please, is, if I might just state it: there has been put in evidence a mat with the statement on it, ‘Oil worth \$10,000 a barrel’. If counsel is going to direct any attention to that, we want to show, if the Court please, that this barrel of Colusa Oil does cost \$10,000; that it requires the production of thousands upon thousands of barrels of water.

“The Court: Is that all?

“Mr. Zirpoli: I have a question or two, your Honor.”

The witness then testified on cross examination:

The oil I put my hand in was the oil as it came up from this well; it left a line where the skin was seared; I have not that line now; it gradually disappeared. I worked for Mr. [103] Colgrove up there about two and one-half years.

CHESTER WALKER COLGROVE

was then called as a witness on behalf of the defendants and testified as follows:

I am one of the defendants in this case; my business is producing and marketing Colusa Natural Oil; I have been so engaged for the past three years. Yes, before engaging in this business I made a preliminary investigation of this project; it took me over two years to become sold on this oil—not as to its medicinal quality, but because I recognized it as a merchandising proposition, and I was interested primarily in crude oil in my initial interest in Northern California.

“The Court: We are not concerned here with what you were interested in.

“Mr. Zirpoli: We object on the further ground that there isn’t a question of good faith here. We don’t care whether this was done in good faith or bad faith; that is immaterial. Therefore this line of questioning is likewise immaterial.

“Mr. Gleason: We submit the good faith of the witness is relevant.

“Mr. Zirpoli: It is immaterial.

“The Court: Let us get to the issues involved here in this information.”

I have been engaged in marketing this oil since January, 1940; my first procedure was an advertisement in the Los Angeles “Times” offering the oil on a gratitude price, pay according to your gratitude for the relief you get.

(Testimony of Chester Walker Colgrove.)

“The Witness: The gratitude price offer merely said to pay according to your ability to pay and your gratitude for the relief that you get after you get the relief. That advertisement brought in three hundred and some answers, and we obtained some rather quick clinical results.

“Mr. Zirpoli: Your Honor, I submit that every bit of that [104] testimony is objectionable testimony and properly inadmissible.

“The Court: Gentlemen, be seated. The Court is prepared to rule. The objection is sustained.

“Mr. Zirpoli: I ask that it be stricken out.

“The Court: It will go out. Let the jury disregard it.”

I did not compose the statement, “The emanation is taken up in the blood and as quick as lightning goes to all parts of the body where it kills or checks the disease germs.” Nor did I compose this statement, “Science papers by eminent physicians state that”, followed by quotation. I copied them from a source I relied on as being authoritative. I have a copy of those quotations with me.

As the result of this gratitude price advertisement, Mr. Walter Litholand came to my hotel and I saw him; he would not shake hands with me because of the condition of his hands and said he had not shaken hands for five years. He suffered from a skin condition; his finger nails were two-thirds gone; he was very bitter mentally because of this condition; he was in a bad condition. I observed a desperate man who had scars on his hands.

(Testimony of Chester Walker Colgrove.)

Colusa Natural Oil was used in his treatments; I saw Walter rub some on his hands in front of me in the hotel; I saw him the following Sunday in the presence of Dr. Warren and Mr. Brewer, and he said that Friday was the first good night's sleep he had had in five years; his hands were smoothing up some and his legs also; the itching had stopped.

"Mr. Zirpoli: How does this witness know that the itching had stopped, your Honor? I submit——

"The Witness: The man said so, and he was good authority.

"Mr. Zirpoli: That is hearsay evidence, clearly.

"The Court: It may go out. Let the jury disregard it.

"Mr. Gleason: Q. Did he appear at that time to be in the same mental condition as he appeared on the first occasion when [105] you met him?

"Mr. Zirpoli: I object to that as calling for the conclusion of this witness as to whether he was in the same mental condition.

"The Court: The objection will be sustained. Let it go out and let the jury disregard it. He may state what he observed.

"Mr. Gleason: If the Court please, may I, with the permission of the Court, call attention to a settled rule of law to the effect—I have the authorities and the books here—that any lay witness may give an opinion as to mental condition, as to anguish, torment, joy, happiness.

(Testimony of Chester Walker Colgrove.)

“The Court: He may state what he observed. Let the jury determine it.

“Mr. Gleason: I would like to ask the witness for his opinion, if the Court please, under the well settled rule of law which I have.

“Mr. Zirpoli: I object to that if it calls for a conclusion.

“The Court: He may state what he observed at any time and place himself.”

I observed Walter's bitterness had turned to great relief and joy in having found something that would give him relief; I saw him again two weeks to the day I met him; he shook hands with me; his hands were much improved; they were smooth; lesions and skin conditions I first noticed were not then noticeable. The man was jovial and glad to talk about the relief he was getting; he had been bitter about five or six years of suffering and lack of helpful treatment. His physician's name was Dr. J. W. Warren; he will not be here as a witness on account of the expense involved. No, I did not charge Walter for the oil; I gave the oil to Walter, some \$13.00 to \$15.00 worth.

The “hands” case referred to in the information—the man's name is Homer H. Baumgartner; I first met him on February 28, [106] 1940, in front of the Plaza Hotel in Hollywood; his hands were held up (indicating) in this manner because of the pain; they were covered with matterated scale and were swollen and cracked and bleeding and ugly. I

(Testimony of Chester Walker Colgrove.)

said to him, "I want to show you to a doctor and I want some photographs taken of these hands before you use the oil on them, if you don't object."

"Mr. Zirpoli: I'm sorry. I am going to object to all these conversations between the defendant——

"The Court: Let's get through with this witness."

At that time this mattered scale affected his hands all over; I gave him \$15.00 worth of oil after getting photographs of his hands.

"Mr. Gleason: Q. At the time you got the picture of his hands you went to a photographer's studio, did you not?

"A. I did, and it took half an hour to argue the photographer in letting him come into the photography shop, and he wouldn't do that until he had phoned a doctor that I took him over to first.

"Mr. Zirpoli: I am going to ask that all of that go out.

"The Court: It may go out.

"Mr. Zirpoli: May I ask counsel to instruct the witness not to give us statements made by other persons.

"The Witness: Those were my statements.

"Mr. Gleason: If the Court please, the charge in this case contains these statements with respect to the Walter case——

"The Court: That has no relationship to hearsay testimony. Any hearsay testimony should not go to this jury. That is hearsay; no one knows better than you.

(Testimony of Chester Walker Colgrove.)

“Mr. Gleason: Your Honor, I respectfully—I don’t want to be put in the light of disagreeing with the Court, but I respectfully disagree with the Court. These facts covered by that——

“The Court: That somebody told this witness on the stand——

“Mr. Gleason: Yes, that isn’t hearsay—the fact that [107] somebody told him a certain thing; not for the truth of the contents of the statement, but the fact of the statement certainly proves the res gestae covered by this information. Why is it in there?

“Mr. Zirpoli: No; I think I can state the rule very simply.

“The Court: Be seated, gentlemen. Proceed.”

I saw Mr. Baumgartner after the photographs were taken, the following Friday, two days later; at least fifteen to twenty per cent of the scaling was gone as was the swelling; he could drop his hands to his side without pain; I don’t know if he was finally cured, but the scaling was gone and his hands were cleared up in eleven or twelve days; I have the other pictures certified by the photographer and the doctor.

At this point certain photographs were marked Defendants’ Exhibit O for identification.

The witness continued:

I recognize these photographs, Exhibit O for identification; the one on the left side shows the condition on Mr. Baumgartner’s hands on February

(Testimony of Chester Walker Colgrove.)

28, 1940, as I observed them; the photograph on the right side shows his hands on March 11, 1940; these photographs truly depict the condition of his hands as I observed them; the name appearing there, "Homer H. Baumgartner" was signed in my present by Mr. Baumgartner; this is the "hands" case referred to in the information. I gave this man about \$30.00 worth of oil free of charge.

"Mr. Gleason: Has it been your practice, Mr. Colgrove, in the distribution of this oil, to give it free of charge to hospitals, doctors and whoever wanted it for use if they could not pay for it?

"Mr. Zirpoli: I object to this, your Honor, as a pure and simple sympathetic appeal.

"Mr. Gleason: It certainly shows good faith, if the Court please. [108]

"Mr. Zirpoli: I submit that good faith is not in issue.

"The Court: The objection will be sustained. Let it go out and let the jury disregard it.

"Mr. Acton: May we also have an exception, your Honor?

"The Court: Note an exception."

When I first saw him he had to hold his hands up on account of the pain, and on the second occasion, two days later, he could swing them and walk down the street with me with his hands free from swelling and free from bleeding and twenty per cent of the scales gone.

(Testimony of Chester Walker Colgrove.)

Mr. Gleason then offered the photographs marked O for identification, and they were admitted in evidence and marked Defendants' Exhibit O, and then handed to the jury.

I have observed the results of the application of this oil to skin conditions; I used it on an itching eczema spot on myself; it wipes out the pain caused by a burn; I take a capsule every night and have done so for over a year. I have had occasion to observe the penetrating powers of crude oil. I have also had occasion to test in many instances the penetrating powers of Colusa Natural Oil. I have the two types of oil here with me, some crude oil from Los Angeles County and some Colusa Natural Oil. Yes, I will demonstrate them if opposing counsel desires.

“Mr. Gleason: Q. Mr. Colgrove, there is a reference in this information to an alleged failure to place upon certain bottles of ointment a statement of the quantity contained in those bottles, and as a preliminary question: You manufacture and distribute this—your company does, this hemorrhoid ointment?

“A. The hemorrhoid ointment is manufactured for us.

“Q. And you distribute it?

“A. We distribute it. We furnish the oil.

“Q. You originally manufactured and distributed a three-ounce bottle and a quarter-ounce bottle?

(Testimony of Chester Walker Colgrove.)

“A. Three-ounce tube and a [109] quarter-ounce tin box.

“Q. And those were all——

“A. Properly labeled.

“Mr. Zirpoli: I object to that, your Honor, as calling for the conclusion of the witness, what was done in the past with relation to other tubes or other products. That is immaterial, irrelevant and incompetent as to the issue of the labeling of the particular ointment in this case; the label on the ointment speaks for itself.

“Mr. Gleason: We propose, if the Court please, to show these facts: that Mr. Colgrove's company was engaged in the distribution of this ointment; that they had sold many jars of it under proper labeling; that they reordered from the printer, a firm in San Francisco, some more labels; that due to the inadvertence of the printer—that they had submitted to the printer copy with the quantity stated on it; that due to the inadvertence of the printer that was omitted; I have the firm name, and the man will be called; that Mr. Colgrove discovered it within a very few days, destroyed thousands of labels, and the properly relabeled the ointment, and we submit, if the Court please, that this is directly relevant and competent.

“Mr. Zirpoli: May I be heard on that, your Honor? I respectfully submit that under the Federal Food, Drug and Cosmetic Act if there is a misprinting, if there is a failure to designate upon

(Testimony of Chester Walker Colgrove.)

the particular container the quantity of contents by measure or weight, that whether or not this was done by inadvertence or deliberately or otherwise is totally irrelevant and immaterial. I know counsel is prepared here, possibly, to rise and read some authorities to the Court. I invite this fact to the Court's attention: that at no time have we questioned the good faith of the individual involved here. The question is one pure and simple, regardless of intent or reason or causes therefor, did the defendants in fact ship in interstate commerce a product which was misbranded? [110] And for the reasons which I have stated, which I respectfully submit to the Court is a proper statement of the law, I feel that the question is objectionable, and for that reason I make the objection; and I make the further objection that the statement with relation to prior tubes is irrelevant and immaterial and should be stricken from the record.

(Argument.)

"The Court: Proceed. There is nothing before the Court.

"Mr. Zirpoli: Is your Honor prepared to rule?

"The Court: There is nothing before the Court.

"Mr. Zirpoli: I was objecting to the testimony with relation to the prior tubes as being irrelevant and immaterial, and at the same time, your Honor, I ask that that be stricken."

At this point the noon recess was taken.

After the noon recess, the trial proceeded:

(Testimony of Chester Walker Colgrove.)

I ordered the printing of the labels; they were printed by the McCoy Label Company of San Francisco; a representative of that company is in the courtroom; her name is Miss Nelson.

“Mr. Gleason: Is Miss Nelson here? Do you have the letter, Miss Nelson?”

“Miss Nelson: Yes, I do.

“Mr. Gleason: I will ask, if the Court please, that this document which has just been handed to me in open court be marked for identification.”

(The letter was then marked Defendants' Exhibit P for identification.)

(Testimony of Chester Walker Colgrove.)

DEFENDANTS' EXHIBIT P FOR
IDENTIFICATION

6-26-42

Field Headquarters,
Williams, California

COLUSA PRODUCTS CO.

Colusa Natural Oil

Colusa Natural Oil Capsules

Colusa Natural Oil Hemorrhoid Ointment

General Offices

Mercantile Building

Berkeley, California

Telephone Thornwall 9112

January 22, 1941

McCoy Label Co.

Montgomery and Commercial Sts.

San Francisco, California

Attention Miss Nelson

Dear Miss Nelson:

The labels were picked up Monday and on opening today I find the capsule labels unuseable because they fail to have the following wording on them:

“A Natural unrefined Petroleum oil containing sulphonated hydrocarbons”

which should appear just above the words:

“in capsules for internal use”

(Testimony of Chester Walker Colgrove.)

then following that should appear the amount of bottle contents like:

“30 capsules”—for one label

and

“100 capsules”—for other label

I need 2500 of each, front labels only, next week. Please rush them out and send them C.O.D. Also send me 2500 ointment labels with the same wording on the ointment label that is shown on the enclosed box-cover—plus (please add) “contents $\frac{3}{4}$ oz.”

You can make up a good label for this that will fit the little blue jar I am sending under separate cover. No back label necessary on the ointment, and I do not want the ointment label to run completely around the jar, halfway around is sufficient. If you can follow same sort of a general pattern as the oil and capsule labels, I will like it.

Sincerely yours,

C. W. COLGROVE

[Label pasted on]: Colusa Natural Oil. A Natural Unrefined Petroleum Oil, containing sulphonated hydrocarbons (Printing canceled; illegible) Colusa Products Co., Williams, Calif.

[Label pasted on]: Colusa Natural Oil. In Capsules for Internal Use. 30 Capsules. Colusa Products Co., Williams, Calif.

[Pen and ink notation]: 30 capsules and 100 capsules (canceled) then—and 100 Capsules.

(Testimony of Chester Walker Colgrove.)

The witness continued:

This letter, Exhibit P for identification, is the letter mailed in the United States mails to this company ordering some labels.

“Mr. Gleason: At this time we offer this letter in evidence, Defendants’ Exhibit P for identification, and particularly that [111] portion of it with respect to the ordering of 2,500 ointment labels. We offer it first in support of our statement this morning—and of course we are going to connect it up with further evidence—that the printing of these labels and the omission of the quantity, three-quarters of an ounce, on certain labels, was an inadvertence of the printer. We have argued that before the recess and your Honor has indicated your position with respect to that. We are not going contrary to that, but we desire to offer this on that phase.

But apart from that entirely, if the Court please, and independently of that, and without in any manner infringing your Honor’s ruling, we think the letter and all of these facts are admissible for this purpose: Mr. Colgrove is on trial as an officer of the defendant corporation and as an agent of it. We have the law and we are prepared to cite it, that a corporate officer cannot be held criminally responsible for any act of the corporation unless he personally participated in that act and is guilty of the neglect or culpability involved. We propose to show, therefore, if the Court please, that Mr.

(Testimony of Chester Walker Colgrove.)

Colgrove had nothing to do with the circulation or the mailing of this label, but that, to the contrary, this individual defendant did everything he possibly could, as is evidenced by this letter, to see that the proper statement of quantity was put upon the jar. And we propose to go further and show that as soon as the mistake was discovered by him it was immediately rectified and the labels destroyed.

(Argument.)

“The Court: I indicated at the recess what I would rule. I haven’t changed my mind. The objection will be sustained.

“Mr. Gleason: Q. Mr. Colgrove, did you personally have anything to do with the mailing or sending or dispatching of this ointment to Snapp’s Drugstore in New Mexico? A. No, sir.

“Mr. Zirpoli: To which I object as irrelevant and immaterial. [112]

“The Court: Let the question and answer stand. Proceed.

“Mr. Gleason: Did you know or have any knowledge that this ointment was being shipped to the Snapp’s Drugstore in New Mexico, I believe it is, with the particular labels on those bottles that were in fact on them?

“A. I did not know that the labels did not contain the three-quarters of an ounce contents.

“Mr. Gleason: Did you eventually discover that such labels were being sent out?

(Testimony of Chester Walker Colgrove.)

“A. I did, and destroyed the rest of them; I destroyed the balance of those labels and ordered correct labels, a new printing of labels.

“Mr. Zirpoli: May I ask that that all be stricken out as irrelevant and immaterial.

“The Court: The objection will be sustained.

“Mr. Acton: May we note an exception?

“The Court: Note an exception.

“Mr. Gleason: Q. When you ordered the labels printed at the McCoy Label Company, did you in your order ask them to put on the label the designation ‘3/4 of an ounce’? A. I did.

“Mr. Zirpoli: Same objection, your Honor; irrelevant and immaterial as to what he did.

“The Court: Objection sustained.

“Mr. Gleason: Q. In the information, Mr. Colgrove, there is a statement set forth, ‘Colusa Natural Oil is credited by other users with producing relatively as remarkable results as above pictured in relieving irritation of external acne, eczema, psoriasis, athlete’s foot or ringworm, poison ivy, varicose ulcers, burns and cuts.’ You have been marketing this oil for approximately two or three years, as I recall your testimony. Upon what did you base this statement that is contained in this information, the statement just read?

“Mr. Zirpoli: I object, your Honor, it is irrelevant and immaterial as to what he based it on; all that matters is the fact [113] that the statement is is there and the statement speaks for itself.

(Testimony of Chester Walker Colgrove.)

“Mr. Gleason: In this information are various statements quoted from the advertising matter. Counsel has submitted to your Honor instructions that we desire to argue to the effect that if any false statement is contained in any portion of the advertising matter, the mats or otherwise, that this man can be convicted. We desire to show the truth of this statement. We desire to show that when Mr. Colgrove said that ‘Colusa Natural Oil is credited by other users’ he was telling the truth, and we desire to submit to your Honor hundreds of testimonials in regard to this product received from users by the defense.

“The Court: Testimonials cannot go into evidence here.

“Mr. Gleason: I don’t want you to think I am going contrary to your ruling. I make the statement, I make it as an officer of this court, that I believe under this information, under settled principles of law——

“The Court: You may believe whatever you see fit.

“Mr. Gleason: May I present the law to your Honor on that subject?

“The Court: No, we will proceed. You make your offer of proof and you have a record to protect you, and I will rule.

“Mr. Gleason: Q. Mr. Colgrove, in the course of your marketing of this product, can you tell us the number of sales that have been made of this product to people throughout the United States?

(Testimony of Chester Walker Colgrove.)

“A. Many thousands of them.

“Q. You sold your product on a money-back guarantee, did you not? A. Yes.

“Q. Can you tell us how many of the people to whom you sold this product throughout the United States availed themselves of the opportunity to receive their money back?

“Mr. Zirpoli: I object to that as irrelevant and immaterial, and a form of negative proof. I object to it. [114]

“The Court: The objection will be sustained. We are not here concerned with any money-back guarantee. There is no issue involved in this case about money or money back for any sales. Let us proceed.

“Mr. Acton: Will your Honor allow us an exception to the last ruling?

“The Court: Certainly.

“Mr. Gleason: Then we will make the offer of proof and that will conclude this subject. We offer to prove the following facts by this witness at this time:

“First, that from persons to whom this preparation was distributed by these defendants throughout the United States, hundreds of testimonials, the originals of which are here available for inspection and we have gone to the trouble of copying them—hundreds of testimonials, voluntary testimonials, have been received by this company and by this defendant.

(Testimony of Chester Walker Colgrove.)

“We further offer to prove that this product was marketed and distributed to these thousands of persons under a money-back guarantee if not satisfied, and that out of the thousands of people to whom that guarantee was made, approximately two per cent availed themselves of the guarantee.

“We further offer to prove, if the Court please, the truth of the statement contained in this information. We offer these testimonials, and these testimonials will prove the truth of the statement that ‘Colusa Natural Oil is credited by other users with producing relatively as remarkable results as above pictured in relieving irritation of external acne, eczema, psoriasis, athlete’s foot or ringworm, poison ivy, varicose ulcers, burns, and cuts,’—the statement contained at lines 13 to 16 on page 3 of this information and reincorporated by reference in later portions of the information. And we offer those facts, if the Court please, as being relevant, pertinent and competent in the [115] proof of the issues involved in this case.

“Mr. Zirpoli: If I might respectfully submit, your Honor, as I have heretofore had occasion to state in arguing various points before the Court, that there was no element of fraud or bad faith involved; it is a simple case of misbranding, and that therefore testimonials are not admissible in evidence. Had this been a fraud case, then the position taken by counsel would have been a proper one, but this is a misbranding case and not a case predicated upon fraud or fraudulent intent.

(Testimony of Chester Walker Colgrove.)

“The Court: The objection will be sustained.

“Mr. Doyle: Exception if your Honor please.

“The Court: Certainly.

“Mr. Gleason: At this time, if the Court please, simply to complete the record, we desire to have the original testimonials marked for identification.

“Q. To get a preliminary foundation, you have handed me, Mr. Colgrove, a file containing various papers. Did you prepare that file?

“A. No, sir; those letters were written by individuals.

“Q. I mean, did you put these into the file?

“A. Yes, sir.

“Q. What are they?

“A. Voluntary testimonial letters received from purchasers of Colusa Natural Oil products.

“Q. And you personally know that these are voluntary testimonials sent into the office?

“A. Yes, sir.”

Thereupon, Mr. Gleason offered these original testimonials in evidence.

“Mr. Zirpoli: Same objection; irrelevant and immaterial.

“The Court: Same ruling.

“Mr. Gleason: May they be marked, then, for identification?

“The Court: Let them be marked for identification.”

The proffered testimonials were then marked Defendants' Exhibit Q-1 for identification.

(Testimony of Chester Walker Colgrove.)

DEFENDANTS' EXHIBIT Q-1 FOR
IDENTIFICATION

6-26-42

EXCERPTS FROM VOLUNTARY TESTI-
MONIAL LETTERS FROM USERS OF
COLUSA NATURAL OIL PRODUCTS

Mrs. M. Perry
Phoenix, Arizona

October 20, 1941 "I can never say enough in favor of Colusa. It gives instant relief from itching and for me a perfect healing where the skin breaks out. When it was first brought to my attention I had a bad place on my right leg. Was in bed twice with a bad infection from scratching. The area was spreading and I had used untold remedies and spent so much. To say I was worried is putting it lightly. I was a nervous wreck. My leg had been bothering me for months and was getting worse all the time. Everything I used gave a little relief but the itching would become intolerable and I could see it would never heal with the ointments and what not I had been, and was using prescribed by doctors and recommended by friends. I believe I bought (if not the first) one of the first bottles of Colusa sold here, for I told the druggist to let me know when it came in. I was really desperate. You give a three day guarantee. Well, after the second day money couldn't have bought

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

that bottle. It gave instant relief. There was no skin left on that area of my leg and it was an extensive area. The oil was so soothing I was amazed that anything could feel so like nothing when applied, yet give such healing. Inside of two days it had stopped itching entirely and a thin skin was forming all over. Now you can see why I don't want to be without it. I still have little patches of breaking out but the Colusa fixes it up immediately. My leg, however, has never given me any more trouble—not even a scar forms. My son and son-in-law use it for athlete's-foot and find it unexcelled. I could go on telling you of people I have given a very little (for a little goes a long way) and they too sing its praises. Am so glad to hear you are going to advertise, for I have been so hopeful that more who suffer from skin ailments would find out about this most wonderful healer."

Eczema and Athlete's-Foot

Karl D. Pettit & Co.

20 Exchange Place

New York

April 22, 1942 "Several weeks ago I casually saw your advertisement in the newspaper and it impressed me as an intelligent appeal. Therefore, I got a bottle of your Colusa Natural Oil. Much to my amazement it completely cured a skin dis-

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

ease I have had for over three years. In 1939 I contracted a disease on my hands that was diagnosed as eczema, athletes-foot and what have you. I went to the finest skin specialists in New York and have probably paid out several hundred dollars for X-ray treatments and just about every sort of salve or lotion the human mind could conceive. Not a single one of them cured my condition and then, out of the blue came Colusa. I feel it is my duty to tell you that I do feel very much indebted to you and if you have any "Doubting Thomases" in this New York district, just refer them to me."

Eczema and Athlete's-Foot

Bertha Eckhardt

22 West 68th St

New York

April 13, 1942 "Replying to your letter, I certainly can recommend the Colusa oil for eczema, as well as athlete's foot, as I have had personal experience with both. I, too, spent many years with skin specialists, under treatment for athlete's foot, and a number of times was confined to my home for several weeks because I could not wear shoes. The amazing thing to me about this Colusa oil is the short time it took to clear up my ailment, and the fact that the trouble did not recur, although it is now about four years since I used it for

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

athlete's foot, and I have gone through a number of hot summers, which is usually the worst period for that particular ailment. Also I have two friends who have had the same experience with eczema, and they tell me they have not had any trouble since using the oil. I still keep a bottle of the oil on hand, particularly in the kitchen, as I have found it excellent for burns. As for the capsules and other uses for the oil, I understand excellent results have been had, but since I have no first hand information on them I cannot give you anything definite—however, as for the ailments mentioned above the oil works like a charm.”

Psoriasis

Mrs. Maud Neece

219 Roselawn Ave.

Modesto, California

March 28, 1942 “My Psoriasis has been a very long standing case of seven years. I find my hands, foot and other parts of the body are looking so much better. The spots seem to be healing and drying up. I am taking three Colusa pills daily before meals. I have been to many and the very best doctors and skin specialists in the State. No kind of treatment has ever helped me. So I am so thrilled now to see what Colusa pills and oil is doing for my Psoriasis. Hope I shall soon be rid of it forever. A million thanks to you and Colusa Co.”

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

April 9, 1942 "I am the happiest and most grateful person in the world, for the grand results I am getting from Colusa Products. My doctor was shocked when he seen my hands and said we will now be able to help other poor people with Psoriasis."

Psoriasis

Clyde Shelton
7018 Eastman St.
San Diego, California

April 25, 1942 "I am sending you another order—for the capsules. I have used two bottles of the oil and am now using the third. I am really thrilled with results I have obtained so far, but you see I have Psoriasis on both my scalp and body."

Skin Trouble

Marvin Baker
1270 So. Ogden St.
Denver, Colorado

April 2, 1942 "Enclosed find \$5.00 in payment for one \$5.00 bottle of Colusa Natural Oil (4 ounces). Please rush this order. We have used nearly all the two-ounce bottle and think we can see distinct results and want to continue the treatment without interruption."

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

Skin Trouble

A. E. Grube

231 Louie Street

Lodi, California

April 6, 1942 "Enclosed find \$6.00 in payment for \$3.00 bottle of Colusa Natural Oil (2 ounces) and \$3.00 bottle of Colusa Natural Oil Capsules (100 capsules). Skin has cleared up very nice."

Eczema

Mrs. Frank Harris

225 Jefferson St.

Hoquiam, Washington

March 30, 1942 "I received your letter about your Colusa treatment, and must write and tell you. I went to my drug store, the Harbour Drug Co., and ask them if they keep Colusa Oil, and they did and I got me a \$3.00 bottle about two weeks ago. I have some kind of eczema, and I had it on my face and hands, but it sure was burning and itching. I could not sleep at times, but now after two weeks use of the Colusa oil my skin is drying and clearing up and I am going to keep using it until its all gone I hope, thanks to Colusa, and also the advertisement I noticed in my paper when I wrote you."

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

Eczema

Mrs. Naomi E. Ford
2205 N. Fulton Ave.
Baltimore, Maryland

April 23, 1942 "I have used your product and I have recommended this oil to address above. Your oil has practically cleared up a nasty case of eczema for me. Thanks to your product."

Skin Trouble

Mrs. Augusta Storm
15 Park Street
Norwood, Mass.

April 20, 1942 "I want to tell you how much I appreciate your Colusa Products. My hands were in a very bad condition and had been so for almost seven years. I have tried so many kinds of ointments and doctors too, but nothing seemed to help. But, thanks to Colusa Oil and capsules my hands got better in a short time, and now I will always have Colusa Products in my home."

Hemorrhoids or Piles

Mrs. J. C. Erkman
2226 W. 4th Street
Duluth, Minn.

April 22, 1942 "Could you tell me if I would be able to get any of the Colusa Natural Oil Hemorrhoid Ointment. I was sent a tube by a friend

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

in Los Angeles and find it the most beneficial product I've ever used. I would be so glad to know if it is still in the market and where I would be able to obtain it. Hoping to hear from you very soon."

Stomach Trouble

Nellie Robinson
466 Seabright Ave.
Santa Cruz, California

April 5, 1942 "I am so happy over all I don't know just what to say. Before I saw your ad in my morning paper I have prayed to God to lead me to his own remedy. * * * Before I got the oil and capsules I took baking soda two and three times a day. Now I eat what I want and don't need soda thanks to Colusa Products."

Psoriasis

Mrs. Hazel V. Noll
Richland
Pennsylvania

April 14, 1942 "I just want to let you know that it is one month now that I am using your Colusa oil and capsules—I can see a big change already. All these years I have been told by different doctors that Psoriasis could not be cured, well I have tried the oil and capsules and see for myself what it is doing for me. I have used half of my

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

order and I think it is doing wonders for me. My legs were so bad that I couldn't wear silk hose. I will never be without Colusa oil and capsules as long as I can afford to get them. I shall always remain a friend and user of Colusa Products."

Leg Ulcer

Mrs. Jas. H. Horan

Redding, California

April 27, 1942 "Please find enclosed money order for \$6.00 for which send me oil and capsules. It is sure good stuff—my leg was awful bad. It is healing pretty fast. Another little place broke out on my other leg. I guess it is the oil bringing out the poison. I put it on morning and night. Please send as quick as possible."

Skin Trouble

Mrs. O. C. Beckenhauer

107 North 9th Street

Norfolk, Nebraska

April 9, 1942 "Will you please send C.O.D. your \$3.00 bottle of oil and \$3.00 bottle of capsules as soon as possible. The medicine has been doing me a lot of good."

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

Eczema

Art Roberts

3525 Nevada Street

Fresno, California

March 30, 1942 "Enclosed find \$3.00 in payment for \$3.00 bottle of Colusa Natural Oil (2 ounces). If improvement continues with the use of this next bottle I should be completely cured of my eczema."

Eczema

Louis Pilivet

Lankershim Hotel

San Francisco, California

March 28, 1942 "Find money-order for three dollars (\$3.00) for another bottle of Colusa Oil. I am very much better. I know it is helping me a lot."

Leg Ulcer

William G. Wharett

1242 20th Avenue

San Francisco, California

April 2, 1942 "Will you be so good and send me one bottle of oil. Enclosed please find check—please send it early as possible. I am getting along fairly good. The ulcers are closing up slowly and I must state that I am greatly pleased with your wonderful product."

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

Psoriasis

Gladys Jackson

119 Hancock Street

Rock Springs, Wyoming

April 25, 1942 "Enclosed please find money order for \$10.00 for which will you please send me: one \$5.00 bottle of Colusa Natural Oil and one \$5.00 bottle of Colusa Natural Oil Capsules. Mine is a very stubborn case of Psoriasis, but is responding most satisfactorily to treatment with your Colusa products; and I'm indeed grateful for Colusa oil and capsules."

Skin Trouble

Mrs. Martha M. Thompson

Grand Rapids, Michigan

March 30, 1942 "I have received so much help already—it has removed all these oogley scales I call them and stopped that terrible itching that almost runs one crazy. * * * We have paid out a thousand dollars doctoring and this has helped me more in the length of time I have used it than everything I ever used. No wonder I thank you so much and I feel that at last I have found something that will give me a little comfort."

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

Ira R. Morrison

Box 773

Chico, California

April 26, 1942 "I have been using Colusa Oil for a skin eruption for about ten days now * * * It has helped me more than anything else I have used."

Mrs. C. W. Rigg

1009 So. 11th St.

Kelso, Washington

April 16, 1942 "I am sending for a bottle of Colusa Natural Oil, price \$3.00—it has helped me so much. * * * I have quite a few tablets yet will send for more. * * * Thanking you for the good it has done me."

Ed. Santa Cruz

503 Brokerick St.

San Francisco, California

April 4, 1942 "After three days of using Colusa oil I'm rapidly improving. Please send me C.O.D. a 2-ounce bottle of oil."

April 15, 1942 "Enclosed find \$5.00 money order in payment for \$5.00 bottle of Colusa Natural Oil (4 ounces). I know now that I am on my way to a complete recovery—thanks to Colusa oil and capsules. You will hear from me in the near future."

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

George Sullivan

R #1 Box 107

Bangor, Pennsylvania

April 16, 1942 "Please send the above item (\$5.00 bottle of Colusa Natural Oil) C.O.D. by air mail as I need it bad for my little boy as the others helped him wonderously already."

Mr. Joe Wallace

123 South "E" St.

Livingston, Montana

April 2, 1942 "Please send C.O.D. one \$3.00 bottle of capsules. Would like you to know I am on my second bottle of oil, and just finishing up on the first bottle of capsules. I am not entirely cured but am able to be back at work. The oil is the only thing that I have tried that has helped me."

Mrs. E. Rasmuasen

421 "A" St. NE

Washington, D. C.

April 11, 1942 "I have used Colusa for seven days and wish to express my sincerest appreciation for it. It worked like a miracle on my skin—all the red rough skin disappeared in three days. * * * I see many people here with bad skin and wish all of them could use Colusa."

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

Chas. Hamilton

1856 So. Jackson St.

Frankfort, Indiana

April 16, 1942 "I am enclosing \$3.00 for a two ounce bottle of Colusa Oil. I will soon have my first I got used up and I don't want to get out of it. It has surely done the work. I have been bothered with breaking out on my legs for over a year and have doctored and tried several different remedies. They would help but they wouldn't stop the burning irritation till I got your treatment. I feel I have got relief at last but I want to keep a bottle on hand. My wife tried it on a burn she got on her arm and it worked fine—it never blistered or got sore. So I am well pleased with it. I have been getting more sleep since using it than I did before and that is worth a lot to me."

Mr. T. A. Abess

1002 East 27th St.

Houston, Texas

April 17th, 1942 "Please send me a \$3.00 bottle of the Natural Oil only and send C.O.D. on delivery and send it quick as possible as the second treatment seems to help a lot. That's why we want more at once."

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

Athlete's-Foot

Joseph J. Barry

West Coast Studios—Warner Bros.

Burbank, California

April 11, 1942 "I have been using your marvelous oil for an infection on *on* my hands which has been described by doctors as athlete's foot and ring worm, and it is doing a marvelous job—better than anything I have used yet. I have had this infection for almost a year now and have tried various things prescribed by the doctors but none have done much good."

Skin Trouble

G. Espelond

San Francisco, California

April 15, 1942 "I have used up the Colusa Natural Oil and it surely has done wonders."

Mrs. Helen C. Weiler

Room 725 South Pacific Bldg.

San Francisco, California

April 14, 1942 "Enclosed find \$6.18 in payment for one \$3.00 bottle of Colusa Natural Oil (2 ounces) and one \$3.00 bottle of Colusa Natural Oil Capsules (100 capsules). Have tried everything. Even gone to the best doctors in the city. No result.

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

This May Do the Work. (face breaks out and bleeds dreadfully.”

April 22, 1942 “I have tried everything on God’s earth, but Colusa Oil beats anything I have tried.”

Otto Rosel, Druggist
Grafton, Iowa

May 27, 1941 “A month or so ago after shaving I acquired a bad itch and could do nothing with it. It was so bad I expected a *diege* of several weeks or months, when along came your Colusa Oil, and in three days I was cured, and had relief at once.”

Eczema

Mrs. Hardin
Richmond, Va.

Nov. 25, 1940 (letter to Clark Pharmacy, 1701 W. Adams St., Los Angeles, California) “I was in your store one day before coming here on a visit, and bought a bottle of Colusa Natural Oil for Weeping Eczema, and I was relieved in a short while. I hardly know how to express my appreciation for such a remarkable remedy. Before using Colusa Natural Oil I had tried various ointments recommended for Eczema but I had found so little relief.”

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

Insect Bite

Dr. R. O. Lilyquist
Story Building
Los Angeles, California

January 2, 1940 "I used the natural oil on my legs where I had some sores caused by some grass ticks and just one application cleared it all up, and I've tried most everything for over a year."

Eczema

F. O. Burckhardt
Hotel Mayflower
Seattle, Washington

July 19, 1940 "I am just as much sold on the oil as I ever was and beg to give you an example of what it did for a woman in the past few days. On Sunday night she called me at my room, or rather Monday night, and asked me if I had any more of that wonderful oil that she had heard of. Said she was in the lobby and wanted to talk to me, so I asked her up. I happened to have a doctor visiting me at the time and he told me not to have anything to do with it, as he was sure it could do her no good and might get me into complications. However, she came on up and she had on white cotton gloves to hide the eruptions on her hands and in addition she had the same thing on her chest and arms. Said she had been doctoring but the thing

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

kept getting worse and spreading. I did have a very small vial of the oil, which I gave her with instructions as to its application. Just a few minutes ago she called me on the phone and said she was practically cured but was out of oil, so I called a friend who had a little left which I will give her to-night. If you ever heard a grateful woman talk over the phone you should have heard her and I am thankful that I had something to do with giving her this happiness. Surely a product of that sort should not be taken away from suffering humanity. So please write me and tell me what's what."

Skin Trouble

George S. Allan

16 Sutton Place

New York City, N. Y.

January 12, 1942 "Will you please send me C.O.D. one 2 fluid ounce bottle of your Colusa Natural Oil. After endless treatments from several skin specialists I have found that Colusa is the only ointment that aids the particular skin disease I have."

Eczema

Mrs. H. Schaer

1321 Toulumne St.

Vallejo, California

June 18, 1942 "Would like to have you send me a large bottle of Colusa Oil, C.O.D. Have been using

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

it on my baby to clear eczema and one bottle helped so much I want another."

Stomach Trouble

Mr. Harold Clark
725 W. Michigan Ave.
Ypsilante, Michigan

April 26, 1940 "I was talking to a friend of mine the other day, who told me he was taking your oil for ulcers. I have a deuodenal ulcer and have taken your oil and I feel that it has helped me. I would like a three dollar order of it sent. I have had my ulcer about four years now."

Psoriasis

Mrs. H. L. Turner
2849 NE Ulysses St.
Minneapolis, Minn.

April 18, 1940 "It is now six weeks since I received your bottle of oil and I feel I have given it a fair trial with very satisfactory results. Through a friend of mine residing in Los Angeles and a friend of hers who seems to have the same skin ailment I have which is psoriasis and she tried this oil and for two years hasn't had a recurrence of it. My friend thought I must try it so she had it sent to me."

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

Stomach Trouble

Warren M. Owen

Brooklyn, Washington

% Saginaw Camp

May 6, 1940 "Enclosed find a P.O. order for which I would like another bottle of capsules of Colusa Natural Oil. My sister, Lola O. Foster sent me a bottle and I think it helped me. So want to try another bottle. Have stomach trouble. I can eat better anyway and gained two lbs. Thanking you in advance, I am——"

Stomach Trouble

William T. Wolsey

504 St. John Street

Ypsilanti, Michigan "I have been troubled with stomach trouble for years—and later years have had to doctor for it all the time. This winter Mr. G. S. Felknor gave me a bottle of pills on trial. I am on my second bottle and haven't had a doctor since. Would like to have you send me two bottles of pills and one bottle of oil C.O.D."

Hemorrhoids or Piles

Frances H. Ott

420 So. Serrano Ave.

Los Angeles, California

June 20, 1940 "I received the tube of Colusa

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

hemorrhoid ointment and find it very healing.
Thank you so much."

Skin Trouble

Georgia L. Williams

Buena Park, California

April 18, 1940 "I do want to tell you what relief I got from the oil. I had a place on my body for three years. I had tried everything to get rid of it—it would break out and itch till it would almost run me crazy. After using your oil a while it has gone. I am very thankful for the Colusa Natural Oil Products."

R. J. Jackman

Rock River, Wyoming

March 17, 1942 "Please find enclosed \$5.00 for another bottle of Colusa Oil—4 oz. size. I am having good luck with the oil. Believe it will clear up my skin."

Mrs. O. F. Burnett

Orchard, Colorado

March 15, 1942 "I used the capsules and oil as directed and my arms are cleared up."

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

Hemorrhoids or Piles and Ringworm

Edgar E. Lasson

Fairview, Utah

March 17, 1942 "I am unable to buy more Natural Oil Hemorrhoid Ointment around here; would like to have you send me 2 or 3 little bottles C.O.D. I can't see why our drug store doesn't handle it, because it is the only thing that will give me relief. I also cured a ringworm on my little girl. It's the best household ointment I have ever used."

Cement Poisoning

John Raun

1109 9th Ave., So.

Great Falls, Montana "I should like for you to send me another \$3.00 bottle of Colusa Oil. I had a case of cement poisoning and if I am not mistaken I am getting over same, anyhow I have improved a lot. Find enclosed \$3.00 money order."

Skin Trouble

C. E. Huson

475 24th Ave.

San Francisco, California

February 4, 1942 "Enclosed is check for \$3.00 for which please send jar of Colusa Natural Oil. It is a pleasure to report that your product has produced a marked change for the better."

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

Stomach Trouble

Virley M. Lamb

Rector, Arkansas

October 31, 1941 "Your Colusa Natural Oil is helping my stomach wonderfully and I am asking you to send me another bottle with 100 capsules in it. I am advertising it to every stomach trouble person. Please send it to me at once."

Eczema

Fred W. Niles

9641½ W. 43rd St.

Los Angeles, California

March 2, 1942 "I got a bottle of your Colusa Natural Oil from a druggist here for eczema. It helped so much that I would like another bottle but am unable to get it in any drug store here. I would like information as to where I can obtain another bottle or if I can order it direct."

Stomach Trouble

J. P. Rankin

Box 164

Chewelah, Washington

March 12, 1942 "I have been taking the oil capsules since I got them and they seem to be doing the business for me. I gave forty-five of them away to other people who had stomach trouble. Now I have only seven left. Please send me 100 capsules

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

and I will send you the money in a few days. Trusting you will do this and send me more booklets. Quite a few coming in to see me have stomach trouble—I think that you will sell a lot of oil and capsules here before long.”

Eczema

Mrs. E. I. Macy

1920 Mission St.

So. Pasadena, California

September 30, 1941 “Kindly let me know where I can get Colusa Oil for my hands—have used it for eczema and it is the only thing that has helped. Can you send me a bottle—I will appreciate it very much if you can let me know where I can get it.”

Eczema

Mr. George Swenson

8717 Bandera Street

Los Angeles, California

September 30, 1941 “I have been unable to purchase any more of your Oil products, and I am wondering if you could send me a \$3.00 bottle C.O.D. I would appreciate it so much as it is the only medicine that has ever helped my eczema. Please let me hear from you.”

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

Leg Ulcer

C. G. Walters

1307 W. 47th St.

Los Angeles, California

March 31, 1942 "Wish to report for this month that my leg ulcer is gradually getting better with your oil treatment and hope soon to be able to get to work."

Leg Ulcer and Face Rash

Olive Fischer

20891½ El Sereno

Altadena, California

August 1, 1940 "I was waiting to write to thank you for the bottle of oil until I could find out the lady's name who gave me the oil, but she is away on a case—I know she is a nurse and lives on N. Fair Oaks. * * * My leg was getting all red again as I was out of the oil and I was so thankful when it came on Saturday. I started right in using it and my leg is getting on just fine. It is so good to get something that really heals it. The breaking out on my face is nearly gone—and I have tried so many things the doctors ordered, also things I tried myself, and nothing would heal it, but the oil just took fine for which I praise the Lord. I do want you to know I am thankful for the oil and how it has helped me."

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

Scalp

Lucille C. Seifert

1150 West 29th St.

Los Angeles, California

February 25, 1940 "When I last talked with you I told you that I was anxious to see whether a scalp irritation which a freind of mine had suffered with for four yeats could be cleared up with Colusa Oil. It did the work in four applications. * * * He is so grateful as he had tried many so-called cures without results. You may be sure I'm giving the oil plenty of advertising wherever I go."

Leg Ulcer

Miss Esther Tuomala

1216 N. Harper Ave.

Hollywood, California

February 27, 1940 "I tried some of your natural Colusa oil for the ulcer on my leg. I am still using it and must say it proved most wonderful—surpassing any of the medicines doctors have used in my case."

April 19, 1940 "After my leg has healed I feel that I could very well say I have a good friend, Mr. Colgrove. Your product was marvelous. Now, I am back to work as masseuse in Hollywood. It will be a tough grind with those terrific doctor bills. Many people have been astonished because my leg ulcer finally healed."

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

Skin Trouble

Mrs. Dorothy D. Shelby
148 E. 51st Street
Los Angeles, California

March 7, 1940 "Received your bottle of Natural oil Tuesday—see some results already. Enclose find money order and please send me another bottle."

Skin Trouble

Mrs. Louise Donnel
3308 Descauso Drive
Los Angeles, California

October 10, 1940 "Will you kindly send me the address of your "Sales firm" in L. A. or Hollywood immediately and oblige? I have used your "natural oil"—given me by a friend and found it helpful so would like to know where to buy it."

Mrs. Harold Berglund
Klamath Falls, Ore.

October 27, 1942 "Please send me a bottle of Colusa Natural Oil. A lady gave me a bottle to tryout. It helps my hands and my bottle is nearly all gone. So I am sending for more. Please send it C.O.D. special delivery."

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

Eczema On Baby

Mrs. Hatsil D. Delano

4746 NE 104th St.

Portland, Oregon

October 14, 1941 "Our physician, Dr. F. T. Maguire, 3530 SE Hawthorne Blvd., Portland, Oregon, recommended Colusa Natural Oil for eczema and gave me a sample bottle to try on our son's face. He is six months old and has had it on his face since he was about three weeks and this oil is the only thing that has helped him. I would appreciate it if you would send me by return mail a two-ounce bottle C.O.D.

Hemorrhoids or Piles

Eczema

Mrs. A. J. Chevalier

R #5 Box 169

Tampa, Florida

August 28, 1940 "Enclosed please find payment for one bottle (or tube) of Colusa Hemorrhoid Ointment. My aunt has used your Natural oil in treatment of her hands. It cured her completely. Whereas she had tried other medicines and many doctors. But they were unable to cure her. Her trouble was eczema."

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

Eczema

Mrs. John Del Margo
316 E. 7th Street
Trinidad, Colorado

September 16, 1941 "I spent hundreds of dollars for my daughters, * * * and really until I came upon your Colusa Capsules and Oil there has not been anything that really helped them. They had eczema so bad that one of them looked just like that picture of those hands that you advertise with your products. After taking your oil one year ago this last August was the first time in three years that child was able to go through the school season. The moment they stop using it I can tell right away."

Eczema

Katherine S. Wheeler
602 East Lake Avenue
Watsonville, California

July 18, 1941 "*Hile* on a trip through Oregon and Washington I recently purchased a bottle of your "Colusa Natural Oil" at the Rexall Drug Store in Salem, Oregon, to treat a stubborn case of eczema on my hands. In less than a week the eruptions have very largely cleared up—and I wish now to get a bottle of the capsules for internal treatment. I have been unable to find your prod-

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

ucts at any local drug stores and would greatly appreciate it if you would mail me one bottle of the capsules, C.O.D., at the address given above."

Eczema

G. A. Ruana

New Leipzig

North Dakota

December 10, 1941 "Due to the fact that none of your produce is handled in our drug store here, and as the last time I purchased your product was in San Diego, California, I would appreciate it if you will send me two bottles of (Natural Unrefined Petroleum Oil) capsules, which contain sulphonated hydrocarbons. You may send these C.O.D. I have been bothered with eczema for a number of years and it generally shows up when winter comes. But since using one bottle of your capsules it shows very little. I still have nearly a full bottle of the oil I am using externally."

Eczema

Mrs. Henry Mensing

2134½ Vallego Street

Los Angeles, California

October 10, 1941 "Would you please let me know if I could possible get some of your natural oil containing sulphonated hydrocarbons? I have a severe case of eczema and that is the only remedy that gives relief, in fact, a very small amount which

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

was given me while on a trip to Minneapolis has almost cured it. So please let me know at once if I can get it, also the price. Have been unable to get it here in L.A.”

Eczema

Mrs. B. E. Mathews

915 Quincy Street

Rapid City, South Dakota

December 29, 1941 “I have a son that has a severe case of eczema. A friend of mine told me that your product, Colusa Natural Oil, cured her sister of eczema. So I would like to try it on our son. Would you please send me a jar of it at once.”

Mrs. Felicia D. Gonzales

R #1 Box 448-A

Santa Paula, California

January 3rd, 1942 “I have been trying to get this natural oil for more than two months. I went to Santa Paula and at the Caugh's Drug Store they told me they were going to get it for me. Later on I came in and they said they didn't order it. Try to get it at Seeber's Drug Store at Sta. Paula and they didn't have any. I went to Ventura Rexall Drug Store and they got my order in order to be sure I could get it. I ordered the Natural Oil and a small bottle of Hemorrhoid Ointment.

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

One week later I made special trip to get it and they said they were sorry the natural Oil was already sold, but I got the ointment. So they wanted to get my order for the second time. I told them I had no car and had to pay to ride. Decided to order it from you. Please rush this order, thank you."

Skin Trouble

H. D. Brown

Briarden Ranch

Paso Robles, California "Enclosed find \$3.00 in payment for one \$3.00 bottle of Colusa Natural Oil (2 ounces). So far the oil has proved a great benefit to me."

Mrs. Paul Vigg

706 N. Spring Street

Compton, California

April 29, 1942 "In the past five months I have been unable to secure your Colusa Oil anywhere. I have tried everywhere. Would you please write me and let me know where I would be able to get it, or if I could buy it directly from you. Thanking you in advance for a quick reply."

Susan Hynd

1333 Pearl Street

Denver, Colorado

April 27, 1942 "Enclosed find \$5.00 in payment for a 4 oz. bottle of Colusa Natural Oil. Your other

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

medicine I sent for last week has helped me so much I am sending for some more so I will not run out of it. My limbs and hands are so much better."

Petra Gancin

Rosebud, Texas

April 27, 1942 "I received your regular six dollar box of Colusa products on April 18th and I started taking the capsules and rubbing the oil on my face the next day; up to the date I have found a great relief, and I had not written back because I wanted to see the effect they were to have on me. I can say that I am very pleased."

Jessie Little

418 Floral Park Terrace

So. Pasadena, California

April 28, 1942 "I had your letter about a month ago and would have answered sooner but thought I'd wait and be sure that the healing of my sore leg would be sure. At first I thought the trouble was going to spread but now I am sure there is to be a clean up. I thought of sending the capsules back but changed my mind and I'm taking them always once a day and believe they help otherwise."

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

William E. Kirby

Maripulli, Ohio

May 4, 1942 "Find enclosed \$5.00 to pay for a bottle of Colusa Oil. I have had wonderful results with one bottle of oil and one of capsules. I am sending one name to you. He won't know who sent it but I hope he will get treatments."

Mr. Joe Wallace

123 South "E" Street

Livingston, Montana

May 3, 1942 "Please send one 2 oz. bottle of Colusa Natural oil C.O.D. My hands still break out a little, but are better now than ever before since they started to get bad. I'm sure if it wasn't for the oil I wouldn't be able to work."

Evelyn Costello

948 York Street

San Francisco, California

May 6, 1942 "Will you please send me another bottle (\$3.00) size of the Colusa Oil, C.O.D. In the two weeks I've been using your products, I have seen astonishing results and am very grateful for having found out about it."

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

Mrs. Brenton

Hanford, California

April 27, 1942 "Please send me the 100 capsules.
Enclosed you will find my personel check. I am
much improved, and thanks to you."

Mrs. C. E. Barker

R #1 Box 791

Grants Pass, Oregon "Enclosed find \$3.00 in
payment for one \$3.00 bottle of Colusa Natural Oil
Capsules (100 capsules). Although the medium has
not cured me yet, I feel sure I am making good
progress and would like another bottle of cap-
sules."

Minnie E. Patten

3640 53rd Street

Sacramento, California "Enclosed find \$6.00 in
payment for one \$3.00 bottle of Colusa Natural Oil
(2 ounces) and one \$3.00 bottle of Colusa Natural
Oil Capsules (100 capsules). I have used the sup-
ply I ordered. I haven't any itching or burning
since using it. My skin is much nicer."

Hemorrhoids or Piles

Norine Short

1234 19th St. NW

Washington, D. C.

April 9, 1942 "I received the order which I sent
you, and am very pleased with the results. En-

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

closed find order for one \$3.00 tube of hemorrhoid ointment, which I would like to get as quickly as possible.”

Stomach Trouble and Piles

Mrs. Melissa Jeter

926 Burton Street

Charlotte, No. Carolina

May 18, 1942 “I just want to thank you so much for your treatment. It sure have did my husband so much good he can sleep at night now—and don’t have any trouble with it and he told a friend just what it has done for him and she has stomach ulcers and piles so I am ordering this for her. It did him so much good and she wants to try it too do you send it by C.O.D. please and I will pay the postmaster when it get here. With much oblige, Respectly your—send it as soon as you can.”

Eczema

Mrs. L. C. Reeves

Rossville, Ga. R #3

May 18, 1942 “I’m greatly pleased with your Colusa Natural Oil. For over 15 years I’ve been bothered with what was pronounced eczema. I was tortured day and night with itching. I had tried everything I heard of but nothing seemed to help me more than a few days at a time. The doctor’s pronounced it incurable, but three weeks ago

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

I got a bottle of Colusa Natural Oil and Colusa capsules, and after a few days treatment the itching stopped and now they seem to be almost well. I think one more 2 oz. bottle Colusa Oil will do the job. I'm sending \$3.00 for a 2 oz. bottle. Please send as soon as possible as I don't want to get out. You may use this letter if it will help anyone that is suffering as I was. I praise your oil wherever I go."

Skin Trouble

Mrs. C. Pollack

25 Stratford Park

Rochester, N. Y.

May 17, 1942 "I have been using the oil for two weeks now, at the time I sent for it I could not use my hands, today they are almost well. I can not say enough for your product and will sure pass it along to everyone I know that is suffering as I was."

Leg Sores

Steve Buckrom

R #2 Point Pleasant

Washington

May 19, 1942 "I just can't find words to express my praise of this wonderful Oil and Capsules, as I had spent hundreds of dollars and no success as my leg just kept breaking out and itching; but with

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

this first \$6.00 treatment all itching gone and healed entirely up. So I'm wondering if I may order another bottle for I don't ever want to be without this wonderful Colusa Oil."

Face Rash

Pauline Erhart

1836 Outpost Drive

Hollywood, California

May 19, 1942 "As you wrote me such a personal letter and have sent me this jar of Colusa ointment, I think I should tell you about the result. For over 4 months I had a terrible rash in my face and all the doctor's treatments didn't bring any relief. And now, after having used Colusa oil for 6 days, my face is almost normal again. All my friends think there must be a miracle. I certainly recommend Colusa very highly."

Mrs. Fred Niemann

R #1 Box 53

Marshfield, Wisconsin

May 18, 1942 "At this writing I will let you know I've used about 1/3 of the oil, of course I diluted it with olive oil and the capsules I took not quite as strong as it says on the bottle, but I can say it sure helped me. I've only used 1/3 of the treatment so far and I am all cleared up. Thanks for the hemorrhoid ointment—it helps a lot. Now

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

that the remedies helped me, I plan on getting my sister to try it also."

Psoriasis

Mr. and Mrs. Robert Crawford
903 Wodsworth Street
Traverse City, Michigan

May 18, 1942 "A few weeks ago I ordered from you Colusa oil and capsules for my husband who has been bothered with psoriasis for 10 years or more, today he is almost cured. He cannot say enough in words, he says, to thank you and your medicines."

Skin Trouble

Alvin Burk
1724½ Euclid Ave.

Santa Monica, California "The Colusa you sent me is working wonders the oil and capsules too, my hand is a 100% better, and I have had this on my hand now for about 8 years and have tried just about everything in the books, and all time it kept spreading, instead of any improving, but since you was so kind to send me this miracle product my hand is on the road to complete cure, and I sure appreciate you doing what you did for me and thank you very much. They may use this statement if they wish."

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

H. E. Hunter

430 Jerome Street

San Jose, California

May 18, 1942 "Kindly send me the Colusa Natural Oil and the capsules. Your products was recommended to me by Mrs. Lydell, 1068 Bird Ave., San Jose. She has been wonderfully benefited by your treatment."

Stomach Trouble

Miss Dolores McDonald

336 North 4th Street

San Jose, California

May 20, 1942 "Enclosed find \$5.00 for bottle of capsules as I now can eat almost everything I want, but felt I should take another bottle. My brother has bleeding hemorrhoids—would like to have you let us hear more about your hemorrhoid ointment, please. Thank you for your past kindness to me."

Skin Trouble

Frances Willard

143 N. Van Ness Ave.

Los Angeles, California

May 19, 1942 "Enclosed find \$6.00 in payment for one \$3.00 bottle of Colusa Natural Oil (2 ounces) and one \$3.00 bottle of Colusa Natural Oil Capsules (100 capsules). I have found the Natural oil and capsules very satisfactory. My skin

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

is clearing up nicely and no more itching. Have used up my oil."

Psoriasis

Pvt. Maurice Mortimer

A. S. N. 36213994

Co. A. 58th QM Regt.

A. P. O. 309, Tacoma Washington

May 16, 1942 "I received an order of Colusa oil and capsules about a month ago, and wish to say I have received astonishing results. I am troubled with psoriasis, but my skin is now spotless and I can not praise Colusa Products too highly. I still have some oil and capsules left, but will be ordering some more in about three weeks as I wouldn't be without it."

Psoriasis

W. C. McAhren

1705 Isabella Street

Sioux City, Iowa

March 22, 1942 "Enclosed please find money for which please send a supply of your Colusa Oil Capsules and Oil. I wish this to be the same as you sent me a few weeks back * * * I am glad to report that this combination has been of great benefit to me. I have had a chronic case of psoriasis for over 12 years and nothing to date has been of any benefit. Your medication has been of help and if the

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

condition continues to improve I feel that it will
'be completely cured in another month.'

Skin Trouble

Geo. C. Johnson

4136 Randolph Street

San Diego, California

May 18, 1942 "Enclosed find \$5.00 in payment
for one \$5.00 bottle of Colusa Natural Oil (4
ounces). I believe your medicine is going to work
wonders."

Eczema

Albert Herzenberg

6233 Wilshire Blvd.

Los Angeles, California

May 16, 1942 "Enclosed find \$3.00 in payment
for one \$3.00 bottle of Colusa Natural Oil (2
ounces). Received very good results and relief
from itching in my case of long-standing eczema,
still have some capsules left."

Mr. John Gustafson

392 Alameda Avenue

Astoria, Oregon

May 15, 1942 "Your cure for eczema was re-
commended by Mr. Camilla. He praised "Colusa"
very highly, and said just a few treatments have
given him great help. Please send me a bottle of
capsules (100) and two-ounce bottle of Colusa Oil."

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

Skin Trouble

Doris Hibbs

3323 Arbor Street

Omaha, Nebraska

May 12, 1942 "Your medicine—a Natural Un-refined Petroleum Oil, containing sulphonated hydrocarbons, Colusa Products Co.—is not available in Omaha. It is the only thing that will take care of my one hand and my supply is practically nil. Will you please send a medium sized bottle of same C.O.D. Time is important."

V. Rogers

P.P. Box 176

Atwater, California

May 13, 1942 "My wife used a bottle of \$3.00 oil for rubbing on her legs and she said you sent a bottle of tablet and she took and it help her and for her sleep. She could not sleep before and it keep her legs warm so she has been talking to me about it so much I decide to try it."

Eczema

E. Clayton

1827 Johnson Avenue

San Luis Obispo, California

May 15, 1942 "Enclosed find \$3.00 in payment for one \$3.00 bottle of Colusa Natural Oil Capsules (100 capsules). Best I have ever used—tried

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

everything from trees to weeds for eczema and this is the only thing."

Psoriasis

John Bush

General Delivery

Newman, California

May 15, 1942 "Received all of your mail today—if you will look in your files of March 13th you will see that. I have been using Colusa Oil and capsules. I was bothered with Psoriasis, not as bad as some people, but bad enough. I used everything anybody told me about until I saw your ad. I must say that Colusa Oil is all that they say, as soon as I started to use the oil the itch stopped and the skin is just as white as the rest of the body, now. I have some of the oil left yet, but I am sending for a bottle of capsules as I think they are the best tonic I ever had. I don't think the Psoriasis will ever come back."

Skin Trouble

C. R. Manuel

May 11, 1942 "I have been waiting to see how the oil would work on me but it is vanishing daily and it has the appearance that it will cure me—it has not been doing so well on my face and neck but I diluted a little last night with olive oil and it healed over night."

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

Scalp Trouble

Nellie Robinson

Santa Cruz, California

May 14, 1942 "I thank God and the Colusa Co. for it has done a wonderful thing for me. My scalp is as clean and no sign of it coming back. For 20 years I had indigestion but not since I am taking your capsules."

Skin Trouble

Cecil Hannah

c/o Adjutant General's Dept.

Topeka, Kansas

May 7, 1942 "My son's face has shown a marked improvement and I believe it will cure him entirely but will reserve my remarks until sure. However, will say that it has done something that nothing else I have given him or treated him with has done and I am really pleased with the results. Also I felt that the medicine was rather expensive but find after using that due to the spreading qualities of the oil it is very inexpensive compared with the price of the different things I have used in the past without any results."

Psoriasis

Lilly V. Johnson

Patterson, California

May 12, 1942 "Enclosed please find my check

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

for three dollars for which please send a bottle of your pills to Mrs. V. Lydell, 1068 Bird Ave., San Jose, California. At the time we first ordered your pills and oil in February, Mrs. Lydell was entirely covered with psoriasis. Now she is nearly cleared up; in face, the spots covering her scalp have disappeared without the application of oil. Do you wonder that we are grateful to you for this almost miraculous relief."

Acne

Mrs. Clyde Shelton

7018 Eastman Street

San Diego, California

May 12, 1942 "Some few days ago I received the jar of ointment that you sent along with my husband's order of capsules, for my acne on my face. I am delighted with the benefits I have derived from the use of it and the oil. I appreciate your sending it along very much. I have been bothered with this acne condition for about 8 years and this is the only thing that I have found to help a lot. I am taking one capsule each day. Yesterday I saw a lady, or rather a girl down town whose face was the worst I have seen—they were just piled up on her forehead and cheeks. I told her about Colusa Oil and took her name and address so you can write her and if it isn't asking too much give her the treatment suggestions. I'm sure she would

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

appreciate it. I told her I was confident if she would use the oil faithfully it would cure her. Her mother told me she had been to the Dr. and hospital day after day but hadn't been helped. I'm going to write her and tell her exactly how I have treated mine. I use a pack every other day in my treatment to draw out the impurities that are deep in my skin. Send her all the information you can as soon as possible, will you please."

Skin Trouble

J. Little

418 Floral Park Terrace

So. Pasadena, California

May 9, 1942 "It is about three weeks or a month since I got some Colusa Oil and Capsules. I have used the oil every day and it has certainly cleaned up my skin and I believe that in a day or two there won't be a spot left. I am going to tell everyone I know about Colusa Oil. May God bless your good work."

Frank Kamula

Box 133

Astoria, Oregon

May 9, 1942 "Enclosed find \$5.00. Please send me one four-oz. bottle of Colusa Oil. The medicine is improving my trouble nicely and I am well pleased. Please rush the order."

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

Telegram from Frank Kamula on May 11, 1942
"Send order of my medicine by air mail immediately".

Eczema

Elmer J. Meyer
4043 Perrysville Ave.
NS Pittsburgh, Pennsylvania

May 5, 1942 "I received my order of Colusa Natural Oil and Capsules on April 25th in good condition. I began using it on the following day for my eczema hands that I have suffered with for almost 2 years, after trying everything. I received relief in 2 days and in 4 days you could hardly see any trace of eczema. I will continue the treatment hoping it does not return. If I should hear of any one suffering from a skin ailment I certainly will be glad to recommend Colusa Oil. Kindly send me a few booklets."

Leg Ulcers

Kathryn McHugh
317 "E" Shorb Street
Alhambra, California

May 11th, 1942. "Enclosed please find post office Order for \$5.00 for some more Colusa Oil. I feel quite encouraged after using the \$3.00 bottle. I have quite a number of capsules yet, but will get more later if necessary. I will be glad to recommend it

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

to anyone suffering from leg ulcers. My sufferings have been almost more than I could bear—have been in the hospital some time, but am with my daughter now.”

Skin Trouble

Steen Hanson

2087 So. Grant

Denver, Colorado

May 6, 1942 “Please find enclosed check for \$5.00 for which please send me another 4 oz. bottle of Colusa Natural Oil. It seems to do good work.”

Skin Trouble

John O'Brien

4198 31st Street

Detroit, Michigan

May 6, 1942 “Am enclosing money order for six dollars. Please forward me one bottle of Mineral Oil, and one bottle of Mineral Oil Capsules. I am glad to inform you that after three years, I am now able to shave every day if necessary and my skin has cleared up so well, my friends have been remarking about it. I gave most of the oil and capsules away that I first ordered, and I think the man I gave them to is continuing the treatment. I will gladly recommend your products to anyone suffering from skin trouble.”

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

Skin Trouble

G. Espelana

San Francisco, California

May 7, 1942 "Enclosed find \$3.00. You seem to be more concerned about getting folks healed than to get their money. I never saw the like of it. And that is the way to do business, by doing good and making money at the same time."

Athlete's-Foot

Mrs. Cora E. Davis

126 "D" Street

Salida, Colorado

May 14, 1942 "Enclosed find \$5.00 for a 4-ounce bottle of Colusa Oil. I wish to let you know Colusa Natural Oil has greatly benefited my feet of a bad case athlete and that I never want to be without having a bottle of this oil on hand, and the Colusa Ointment you sent me have used it as a powder base and find it just splendid for that and many thanks for it and to hear from you soon."

Burns—Athlete's Foot

Ic. C. McElroy

1517 No. Mariposa Ave.

Hollywood, California

October 27, 1940 "About a year ago, while working, I reached down and picked up a bar of iron still very hot from the acetylene torch, and

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

severely burned the whole inside of my left hand and fingers. Another workman applied Colusa Natural Oil to it immediately and the pain stopped entirely in two or three minutes. The burned spots became hard, like callouses, and I went right back to work again, without discomfort and strange as it seems, the blisters healed without filling with water. This was my first experience with Colusa Oil and I since have had a similar experience with like results. In fifty years around the shops I have never seen its equal for burns and my wife completely cured a bad case of athletes foot with but two applications of the oil. I write this hoping others may learn the wonderful properties of your property

Eczema

Mrs. Ned J. Fortney

1013 Newton

Kansas City, Mo.

December 30, 1941 "Please send me one bottle of Colusa Natural Oil. My hands for three years have become gradually to be like those described in the "Story of the Hands." I used one-half a bottle of the oil and my hands cleared up in one week."

Eczema

H. W. Clifford

Kay Hotel, 9th and Main

Kansas City, Mo.

May 11th, 1942 "Enclosed please find \$5.00 for

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

which please send me another bottle of Colusa Oil. This is no doubt the one thing for people suffering with eczematoral conditions—on receipt of my other order I didn't have it so terribly bad, only a spot on my leg. That never has left over 4 or 5 days at a time for a period of five years. This spot at present has disappeared and a healthy look to the skin with not the slightest of itch existing; however, I prefer the safe side after knowing the torture and want the oil on hand."

Psoriasis

J. F. Griffin

Devine, Texas

May 10, 1942 "I thought that you might be interested to know that I have been troubled with that dreadful skin disease known as psoriasis for the past 20 years, and have tried many kinds of medicine with very little relief. I had just about given up all hope of ever finding anything that would do me any good. One day about the first of March of this year, I was reading my newspaper and noticed your little ad in it. I read it over two or three times, and decided to try it; so I sent for the \$6.00 combination of pills and oil. My body was so completely covered with the dry scale that when the medicine came, I thought, that is just about enough to use on one arm, but I mixed some olive oil with the oil to make it cover more surface, and

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

began to use it, and I want you to know that now I only have two or three very small places left on my entire body and still have some of the medicine left. I can truthfully say that this medicine has worked wonders for me and I shall try to keep some on hand at all times."

Psoriasis

Mrs. Helen Gingley

137 Belmont Street

Brochston, Mass.

May 12, 1942 "I want to tell you that I am so grateful for what Colusa treatment has done for me. I have had psoriasis for 30 years and this is the first time my hands have been clear. I have used your treatment only since March 31st, 1942 and I am amazed as well as delighted. I have enough capsules as you have just sent me 200; I am sending an order today for the \$5.00 size of the oil. In reading over your circular you sent me—that doesn't mean that we can't get the treatment all the time, does it? Because that would be a tragedy after getting it off of me as well as it has—it would only let it get bad again. I shall always use that treatment now and so you can keep a bottle of capsules and also oil the \$5.00 size on hand for me at all times because I shall send for it just as soon as I need it. I can't afford to send for an extra supply now because it is quite expensive. But will send for it as I need it. Please assure me that I can always

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

get it. I can do my housework now in comfort and am not depressed like I was before I used your product."

Skin Trouble

Mrs. Mae Griffin

422 West North Street

Springfield, Ohio

May 15, 1942 "Please send another supply of your medicine as it has helped so much to relieve the misery I have been through the last two years. I have been doctoring here but did not get much results; he said it was my age and I had too much sugar in my system. Your oil and capsules have helped the sores more than all the medicine I have taken. I don't know what the sores are called but they start with just a little red pimple under the skin and itch. When they get out they are so ugly looking to have and embarrassing to look at. They have been all over my body; they get awful sore and take so long to heal. I am a widow lady and work all the time so I don't get to use the oil only night and morning but it has been lots of relief. Hoping it will continue to do so for I am tired of people saying what is the matter with your arms."

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

Skin Trouble

J. S. Mosholder

729 Coleman Avenue

Johnstown, Pennsylvania

May 11, 1942 "I have finished your ointment and liquid and I need no more as the sore is o.k. for which I am thankful. If I can do anything for you at any time I will do so—thank you for the remedy."

Skin Trouble

Mrs. C. Pollock

25 Stratford Park

Rochester, N. Y.

May 10, 1942 "I saw your ad in the newspaper and while it was pretty hard for me to send the money, I felt I must try again. So many things have failed, but my suffering was so great I just had to send my order and ask you to hurry. I thank you very much for doing so. Just a week ago I started using your oil and capsules and today I can say my relief is great. I'm sure I must have more oil and capsules and hope you will understand. In the meantime there are a few friends who also, like myself, have tried everything. I will get in touch with them in the very near future."

(Testimony of Chester Walker Colgrove.)

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Identification—(Continued)

Miss Victoria Skiba

17 Erie Street

Elizabeth, N. J. "I will always thank you for I have received so much help. I am the most happiest person in the world from grand results I am getting from Colusa Products."

Psoriasis

Mrs. Esther Cherry

7902 Rosewood Street

Cleveland, Ohio "I am well satisfied with your oil and capsules. I have improved greatly. I am not a bit sorry I tried it because it helped me both ways. * * * I sure will recommend your medicine to anyone I even see that has psoriasis or any suffering that they may have."

Athlete's-Foot

Miss Belle Olson

Deer Park, Washington

May 25, 1942 "I should have written you long before this but have just neglected doing it since I have been using your Colusa remedy. My misery and suffering are gone. I have obtained wonderful results after using your remedy and I highly praise your wonderful remedy and am glad to recommend it to anyone suffering with athlete's-foot. I wish everybody who suffers with athlete's-foot to know

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

that this is a remedy that's worth trying for the sake of happiness. I know it is worth recommending at any time. I had tried every remedy I could find in the drug stores, but got no relief until I tried your wonderful remedy. Would not think of using anything else now. In a week's time to my amazement that dreaded athlete's-foot had paled nearly unnoticeable and in ten days was completely gone. I am sure thankful to your remedy. You may use this letter in anyway that will help to advertise your remedy. I am enclosing \$5.00. Please send me a bottle of Colusa Natural Oil. I wouldn't be without it now, thanking you for the help."

Skin Trouble

W. M. Simpson

Parkin, Arkansas

May 1942 "Want to let you know that I am still using your medicine. It has done me lots of good * * * more good than anything I ever tried. I'd taken radium treatments for five weeks—twice a week—before I got Colusa oil and didn't do me much good on other treatment that cost as much as \$5.00 a treatment but Colusa oil did me more good than any."

Charles Carter

2021½ 4th Street NW

Washington, D. C.

May 22, 1942 "I am satisfied with your products, and receiving great results."

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

Stomach Trouble

Arthur Wm. Davis

% Twin Peaks Mine

Middletown, California

May 24, 1942 "I am 64 years old and have suffered with stomach ulcers and bloody flux for 35 years until the last three weeks. During the 35 years I have patronised doctors, took all kinds of patented medicines with no good results. I started using Colusa Oil capsules three weeks ago and after the 4th day I have felt relieved and cured. I suffer with no stomach disorders or gasrites or anything else with my stomach and am bothered no more with the flux. The oil for external use is A-no. 1 for any skin itching or breaking out; it will cure any skin troubles right away. I don't propose to ever be without both capsules and external oil anymore."

Eczema

Mrs. Roy Williams

Utica, Illinois

May 10, 1942 "Want to tell you that I believe I am nearly cured of eczema. It certainly was dreadful! Itched like bee stings. I itched dreadfully before I broke out in spots, and for a long time I had sore spots on my gums and had to leave my plates out so much, but have had no more sores since I took the oil capsules. I only use one bottle and one

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

and a-half of the oil. I had to use one-third olive oil with the oil. * * * I am so very grateful. * * * Please send me a few more books as some people want to see them, right now. I gave one to a friend to give to a lady who had a child with eczema."

Hemorrhoid or Piles

Willard F. Barber

216 W. 3rd Ave.

Roselle, N. J.

May 20, 1942 "I got from you a jar of pile salve some time ago and will report my piles are healed up with the use of this salve. After using about every advertised remedy and from drug store shelves for over 12 years."

Psoriasis

John F. Snyder

Brookville, Kansas

May 11, 1942 "I bought \$6.00 worth of your oil and capsules and find it better than anything I ever used. I have the psoriasis on my face just where I shave. If I could use electric shaver it would cure the psoriasis quicker as a razor irritates the skin and makes it more difficult to heal. I started to use Colusa March 19."

Skin Trouble

George Sullivan

Bangor, Pennsylvania

May 25, 1942 "Please send C. O. D. \$3.00 bot-

(Testimony of Chester Walker Colgrove.)

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Identification—(Continued)

tle of Colusa Natural Oil capsules as soon as possible as the other bottle did him so much good—already his skin is cleaning up wonderful, thanks to Colusa.”

Eczema

Miss Mary Doe

Higginsport, Ohio

March 19, 1941 “This A. M. some literature advertising your Colusa Oil Products was handed me by a friend who knows my condition very well. The picture of a pair of hands vere very much like mine. I am suffering untold agony—the doctors I have seen say eczema, ringworm and different things. Have had this condition for almost four years and really I have been on the verge of taking my life my agony is so great.”

April 9 1941 “I hardly know how to write to you I am so grateful to you for what your oil did for my poor hands. They are getting well after all these years. I never believed in magic before but do now.”

Itch

F. P. Walker

Clear Lake, Iowa

April 8, 1940 “I have been bothered with what I called an itch for over 15 years, doring which time I had treated, first with a skin specialist in

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

Mason City, then a skin specialist in Des Moines (12 trips). Then tried Excelsior Springs, Mo.; then a nationally known specialist in Chicago, and finally Rochester, Minn., and I had received no relief. Your natural oil completely cleared up my trouble in three weeks' time and I have not had any signs of recurrence."

March 28, 1942 "It began showing results after the first 3 or 4 applications and in 3 weeks I was cured and it is now 3 years without any come back."

Stomach Trouble

Mrs. A. Venable
4750 W. 10th Avenue
Denver, Colorado

May 15, 1940 "We are back in Colorado now. I am sending for a bottle of oil. We have used three bottles and Mr. thinks he can't get along without it. I tried not taking it for awhile and I did notice the difference. My stomach ailment is so much better."

Eczema

Richard P. Hickey
Box 2—Chestnut Street
Riverside, California

March 12, 1940 "Your Colusa oil is doing more good for my eczema than anything I have tried in the past seven years besides all the doctors I have

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

been to and the lot of money it has cost me. I have some left as it goes a long way but will need some shortly."

Eczema

Mrs. N. Aselin

Sheridan Hotel

Minneapolis, Minn.

May 7, 1941 "Two years ago while in California I purchased a bottle of your "Colusa Natural Oil," to use on eczema and found it exceedingly beneficial. Is there some place I can purchase it in Mpls? and if not will you send me a bottle direct."

Psoriasis

Miss Florence Sourwine

121 South 21st Avenue

Maywood, Illinois

May 8, 1941 "I was a severe sufferer of Psoriasis and your Colusa Natural Oil helped me immensely. I have used only two bottles of it and my case has almost entirely disappeared."

Weeping Eczema

C. O. McLees

1155 E 90th Street

Los Angeles, California

May 12, 1941 "I am writing this letter of appreciation for having Mr. Warnak of the Warnack Drug Co., 85th and Central Ave. for calling my

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

attention to your product. I have been troubled for about 5 years with weeping eczema in the canal of my right ear and I had tried every known remedy also paid out many dollars to doctors for treatment also tried X-ray treatments in one of our largest hospitals and received no benefit whatever and was terribly discouraged when Mr. Warnack asked me to try Colusa Natural Oil. In about 2 weeks my trouble had entirely disappeared and I have almost forgotten the terrible itching and irritation in this ear. I still have 1/2 half of my original bottle of oil and would not sell it for \$50.00 if I could not obtain more readily. I hope others who are affected with this skin disease will try Colusa Oil and secure the same results that I have."

Stomach Trouble and Piles

Mr. Howard Everett

1332 South Hope Street

Los Angeles, California

January 8, 1941 "Some time ago, one of my good friends from Iowa, once a banking competitor—told me some almost unbelievable things about Colusa Natural Oil—so completely fantastic, that if I had not known conservative old John Brown of Cedar Falls, Iowa, for over forty years, I simple would not have believed what he told me. Even then—as "the proof of the pudding is in the eating

(Testimony of Chester Walker Colgrove.)

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Identification—(Continued)

thereof"—I bought a bottle of Colusa Natural Oil Capsules and drove some twenty miles to give them to a good friend—a former employee—whom I knew had suffered from stomach ulcers for years and had been on such a restricted diet that he was simply skin and bones. I didn't see how he could last another six months. He told me he had been in distress with almost constant nausea for a long time. Well, bless my soul! if he didn't come over to my home within two weeks and rave about those capsules. His nausea was gone; he was feeling fine; eating ham, eggs, beefsteak—anything he wanted—and talked about inviting five doctors to a banquet in order to exhibit his rapacious appetite. Take my own case in reference to use of Colusa Hemorrhoid ointment. I have been a sufferer for twenty years, bleeding, protruding, itching piles, fistula and everything that goes with it. I tried everything I could find in drug stores and employed physicians. We have the very latest and best recognized ointments—enough to start a prescription case of our own, but I say to you frankly, there's nothing ever came into our home, through either purchase or sample, for the treatment of hemorrhoids that will compare with Colusa in any degree."

Sophia Armbrecht
East St. Louis, Ill.

November 27, 1939 "As I stepped off the train

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

at Davis there was no one to place the small step as you step off the train. In getting off I either sprained—or the way it felt it seemed as if I had torn the muscles away from the bone and I surely suffered untold agony until our train left Sacramento. I was in such misery I did not know whether I should go to a hospital or go home. Then I thought of the oil—I rubbed some on my leg after I had gotten into my berth and of all miracles, I did not have a particle of pain the next morning and have had none since. I would not take a hundred dollars for what it did for me.”

Skin Trouble

Miss Estell Hill

206 W. North Street

Arlington, Texas

May 26, 1942 “I started using your Colusa Oil and Capsules on March 23 on a very bad case of neuro-dermititis (irritation of the skin caused by the nervous system). My arms from my elbows down, and all over my hands; my entire face, neck and in the bend of my knees were very sore, the skin split until it would bleed. There was intense itching with all this, too. I had been bothered with this trouble for two years—I went to skin specialists, and spent a small fortune on medicine to doctor it with, but nothing helped me so much and so fast as did your oil. It is really remarkable.

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

Thanks to your wonderful products, I now have clear normal skin, and plan to be married in June. To all skin sufferers who really want relief, I highly recommend your products. You shall be my friend for life."

Psoriasis

Mrs. Swap

Berkeley, California "It certainly was a great thing when Colusa oil and capsules were discovered. I have tried for 10 years to get rid of my psoriaisis and everything failed, but now I can wear short sleeved dresses and it certainly is a treat. You surely weren't faking when you said what you did about it."

Skin Trouble

Mrs. Bessie Khirzing

154 Jefferson Avenue

Washington, Pa.

May 26, 1942 "I have just finished the bottle of capsules and found them very satisfactory. I can not praise them enough. I was about frantic before taking your products. I thought I could not stand it any longer. I can't bepress to you in words how glad I am with the results. The sores and scabs have all healed on my back. There are some on my hips and legs yet which I know will heal in time."

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for

Identification—(Continued)

Scalp Trouble

Mrs. Dorothy Berg

124 21st Street

Toledo, Ohio

May 30, 1942 "I am writing you to let you know how my skin trouble is coming using the oil and capsules. I received capsules starting with one a day from the 14th of May, then 2 a day from the 17th of May. Received oil on the 21st day of May. Then started with 3 capsules and started at once with the oil but had to use half olive oil as it burned my skin too much. Now it is the 30th of May and my head is like a human beings the first time in 25 years and I am very faithful with capsules and oil. When I started my head was like a board—gave myself hot olive oil treatments took all the scabs off. Then started the oil treatments and so far it has proven great results. I am willing to keep on doing as I have been doing for some time to rid myself of this terrible trouble. * * * I am only too happy to report the great results I have received with the oil and capsules. I would be only too happy to shout it to the world. I am once again like human being. No one knows only those that have a skin trouble the embarrassment of such a disease not no fault of one's self. You have with my happy permission to use this letter or my name in full any time as I am only too happy to help others that have such a terrible skin trouble."

(Testimony of Chester Walker Colgrove.)

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Identification—(Continued)

Itch

Mrs. Adeline Rogers

2588 N. Fair Oaks Ave.

Altadena, California "I have received wonderful results from Colusa Products. Before I started using Colusa oil in my ears for that horrible itching they almost drove me daffy. Couldn't rest at night it made me so nervous. After the itching would cease they would break out with seemingly pimples get so sore I couldn't bear my ears to touch the pillow. After a few treatments I could rest at night and my ears seem to be normal again. Thanks to Colusa Oil and to you."

Skin Trouble

Mrs. M. Nastav

947 Orville St.

Kansas City, Kansas

May 26, 1942 "This is the very first time I am sending for some of this Colusa Oil and it sure has helped me wonderful. I met a friend of mine at a shower and she told me about it. She gave me a sample and I just put it on once it leaves the itch and pain immediately. So you see I can't praise it enough. I also shall tell my friends."

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

Skin Trouble

Harry W. Gray

3 Merrill Street

San Francisco, California

June 1, 1942 "Enclosed find \$6.00 in payment for one \$3.00 Bottle of Colusa Natural Oil (2 ounces) and one \$3.00 Bottle of Colusa Natural Oil Capsules (100 capsules). It is the only thing that I have used that gave me any relief."

Skin Trouble

Mrs. Willie E. Clark

518 Lottie Street

Waco, Texas

June 2, 1942 "I received the treatment and have used it steadily ever since—my leg was a terrible looking thing all scaly and dark and itched so I couldn't hardly do anything for scratching but now it is so much better—the itching and scratching is almost gone. Colusa Oil and capsules are marvelous, I can speak for it anywhere. I hope to be able to get another order in soon. I want to always keep some on hand. Thanks to you all for Colusa Products."

(Testimony of Chester Walker Colgrove.)

Defendants' Exhibit Q-1 for
Identification—(Continued)

Skin Trouble

Mrs. Minnie Gibbs

3835 Yates Street

Denver, Colorado

June 3, 1942 "I received the last order of pills.
* * * Many thanks—am fine now. No more sore
face for me since I know about Colusa Remedies.
I'd been getting treatments from 2 best skin spe-
cialists here and seemed to help, then sores break
out again and was so discouraged for 2 years. Now
to be free is wonderful. When I write a letter to
my friends or relatives I mention Colusa."

"Mr. Doyle: May we have an exception to the
last ruling, your Honor? [116]

"Mr. Gleason: Q. You heard me read, Mr. Col-
grove, a statement from the information in this
case with respect to other users crediting various
and sundry things, a statement contained in some
of the advertising matter. Upon what did you base
that statement?

"Mr. Zirpoli: Same objection; irrelevant, incom-
petent and immaterial.

"The Court: Objection sustained.

(Testimony of Chester Walker Colgrove.)

“Mr. Doyle: I desire an exception, if the Court please.”

The witness continued:

Yes, I made a very thorough investigation before engaging in the marketing of this product; I talked with users of the oil; engineers, people who had sold it previously to my knowledge of it, or having heard of it; and it had the reputation of a real miracle product.

“Mr. Zirpoli: Your Honor, I ask that the witness’ statement about its reputation go out.

“The Court: Let the miracles go out, ladies and gentlemen of the jury, and disregard it for any purpose in this case.

“Mr. Gleason: Do you have available, Mr. Colgrove, the statement upon the basis of which these statements were incorporated in the newspaper mat with respect to the efficacy of radium through the body. Can you give counsel the authorities from which that was procured?

“A. Yes, sir.

“Mr. Zirpoli: I object to that. Authorities as given by this witness are irrelevant and immaterial.

“Mr. Doyle: May he answer the question, if your Honor please?

“The Court: What question?

“Mr. Doyle: The question as to the source from which he obtained this statement which appears quoted in the mat. It appears as quoted. [117]

“The Court: It matters very little the source of

(Testimony of Chester Walker Colgrove.)

the information or where it came from. We are not concerned with the source of it.

“Mr. Doyle: Exception, if your Honor please.”

It was here stipulated that if Miss Nelson, representative of the firm which printed the labels, were called she would testify this was a mistake on the part of her printing firm; and that in the printing of the labels involved in the Third Count in this case, the designation “ $\frac{3}{4}$ of an ounce” was inadvertently omitted from the labels, and that Mr. Colgrove, as manager of the defendant company had previously sent said printing firm a letter, marked here as Defendants’ Exhibit P for identification, which was received by the McCoy Label Company; and that within a week of this time, Mr. Colgrove had the label company correct this inadvertence and put upon the label the designation “ $\frac{3}{4}$ of an ounce.” Will that be so stipulated?

“Mr. Zirpoli: Subject to the objections heretofore made that it is irrelevant and immaterial.

“The Court: Objection sustained.

“Mr. Gleason: An exception, if the Court please.

“The Court: Very well.”

Mr. Gleason, at this time, to complete that record, offered in evidence Defendants’ Exhibit P for identification, which is the letter Mr. Colgrove previously referred to.

“Mr. Zirpoli: We make the same objection. It

(Testimony of Chester Walker Colgrove.)

was offered once before, and I object again that it is irrelevant and immaterial.

“The Court: Objection sustained.

“Mr. Doyle: May we have an exception?

“The Court: Exception.”

The witness was then cross examined and testified further:

I obtained the first production of oil in 1939 and began [118] marketing in January of 1940; I had drilled a gas well on property twelve miles east of this property, and when I became interested in the medicinal oil, I negotiated for the lease on the property where this medicinal oil could be obtained. From 1922 to 1927, I was president of a coal company, called Empire Collieries; from 1928 to 1932, I had a business known as the C. W. Colgrove Systems, Inc., which was a mutual estate association under which I sold life insurance.

“Q. In 1930, did you continue the operation of the insurance business in the State of Illinois?

“Mr. Gleason: We object to that on the ground that it is incompetent, irrelevant and immaterial, and has nothing to do with the issues in this case.

“The Court: Objection overruled.

“Mr. Gleason: May we have an exception?

“The Court: Note an exception.

“A. Yes, sir.”

It was here stipulated that defendants' objections would run to this line of questioning with exceptions reserved.

(Testimony of Chester Walker Colgrove.)

The witness continued:

I quit the insurance business in 1932; I sold some oil leases in Colusa County in 1938; I am president and treasurer of the Empire Oil and Gas Company; my daughter is secretary; my wife, daughter and I constitute the board of directors; it is a family corporation; Colusa Products Company is a fictitious name company which operates as a sales agency, and is owned by Empire Oil and Gas Corporation.

“Mr. Zirpoli: Q. Mr. Colgrove, do you ever recall appearing at the—just one question: You told us about a Mr. Watson, I believe, being a drug consultant.

“A. Mr. Dick Addison.

“Q. Anderson? A. Addison.

“Q. Of course, you don't mean by that he is a man employed by the [119] Federal Food and Drug Administration?

“A. No, an independent occupation.

“Q. And he has no governmental connection as an official?

“A. Not now. I think he previously did.”

The Mr. Addison I referred to is an independent consultant. I remember appearing at a hearing in Los Angeles and submitting a brief in quadruplicate to Mr. Andrew Brown; I think the paper you now show me is a copy of it.

“Mr. Gleason: Just a moment, Mr. Colgrove; we object to [120] this on the ground that it is incom-

(Testimony of Chester Walker Colgrove.)

petent, irrelevant and immaterial, if the Court please, not proper cross examination, has no bearing upon the issues in this case.

“Mr. Zirpoli: I would like to submit I am entitled to test the credibility of the witness, your Honor.

“Mr. Gleason: It has nothing to do with the credibility of the witness.

“Mr. Zirpoli: Yes, it has.

“The Court: When was this?

“Mr. Zirpoli: The witness took the stand.

“The Court: In 1939?

“Mr. Gleason: This is a letter, if the Court please, dated October 28, 1940. So the Court will know——

“The Court: I will allow it. Objection overruled.”

The letter you show me is a copy of a letter written me by Dr. Woodman, but the original letter did not have “M.D.” after his signature; my stenographer must have added the “M.D.” by mistake. When I submitted the letter it evidently had “M.D.” on it; I knew Dr. Woodman for six months and saw him the day of the hearing; the photostat you show me is a copy of the letter Dr. Woodman gave me and “M.D.” does not appear on it.

“Mr. Gleason: We object to that on the ground that it is utterly incompetent, irrelevant and immaterial. What bearing has that on this case?

“The Court: That is a matter entirely for the jury. Let the jury determine.

(Testimony of Chester Walker Colgrove.)

“Mr. Glason: He testified that his secretary made a mistake.

“Mr. Zirpoli: I will ask that these two exhibits be marked next in order in evidence as one exhibit.

“Mr. Gleason: May we have an exception?”

The documents were admitted and marked Government's Exhibit No. 13. [121]

PLAINTIFF'S EXHIBIT No. 13

Dr. Wm. G. Woodman
Physician and Surgeon
Suite 1221 Quaranty Bldg.
6331 Hollywood Boulevard
Hollywood, California

Oct. 28, 1940

To Whom It May Concern:

This is to state that I have used Colusa Natural Oil both internally in capsule form and also as an external application on a number of cases of psoriasis with considerable benefit to the patient. There has not been a single case in which there have been any unfavorable reactions.

Previous to the introduction of the Colusa Natural Oil I had refused to accept or treat psoriasis but I now feel that I can conscientiously accept them and help to alleviate their condition.

Sincerely yours

(Signed) WM. G. WOODMAN, M.D.

[Endorsed]: Filed June 26, 1942. .

DR. WM. G. WOODMAN

PHYSICIAN AND SURGEON

SUITE 1221 - GUARANTY BUILDING

6331 HOLLYWOOD BOULEVARD

HOLLYWOOD, CALIFORNIA

GLADSTONE 1080

October 28, 1940

To whom it may concern:

This is to state that I have used Colusa Natural Oil both internally in capsule form and also as an external application on a number of cases of psoriasis with considerable benefit to the patient. There has not been a single case in which there have been any unfavorable reactions. Previous to the introduction of the Colusa Natural Oil I had refused to accept or treat psoriasis but I now feel that I can ~~consciencely~~ accept them and help to alleviate their condition.

Sincerely yours,



Dr. William G. Woodman

WGW/hc

U. S. DISTRICT COURT

No. 27554-R

U. S. EX. No. 13 in evidence.

FILED June 26, 1942

FALLEN & MALLING, CLERK

(Testimony of Chester Walker Colgrove.)

“Mr. Gleason: May we have an exception, if the Court please?

“The Court: Note an exception.”

The witness testified further on redirect examination:

“Mr. Gleason: Q. Referring to this letter that counsel just asked you about, in any of that type-written copy attached to the photostat and upon which appears ‘Dr. W. G. Woodman, Physician and Surgeon, Suite 1201 Guaranty Building, Hollywood,’ and the signature, ‘W. G. Woodman, M.D.’, did you cause this to be typed and the ‘M.D.’ to be placed thereon?

“A. I didn’t cause the ‘M.D.’ to be placed thereon.

“Q. Your secretary did that? A. Yes.

“The Court: Q. How did it get on there?

“A. I caused the letter to be copied and she copied it and put the ‘M.D.’ on as a mistake.

“Q. You didn’t put it on? A. No.

“Q. You don’t type your letters, do you?

“A. I don’t type my letters, and I don’t indulge in misrepresentations.

“Mr. Zirpoli: Q. But that is one of the carbon copies you gave to Mr. Brown of the Food and Drug Administration?

“A. I have admitted it such, yes.”

DR. W. T. S. VINCENT,

who had previously been sworn as a witness, was then recalled by defendants, and testified further:

The Guidry case was one of *acne vulgaris*; I have seen Mr. Guidry in the courtroom yesterday and today; he is now in the courtroom—he is that gentleman in the green suit.

“Mr. Gleason: I want you to tell the ladies and gentlemen of the jury briefly his condition today with respect to his face, compared to what it was when you first started to treat him.

“A. Well, there is a vast difference. I noticed when I was talking to him there is a decided difference, because when he came first [122] to the office he was truly a tough case of *acne vulgaris*, being the worst of the two *acnes*. He had just about as bad a case as ever I saw. Do you want me to say anything about being under treatment at the time?”

His condition is vastly improved and vastly better than when I first saw him in the office. Yes, he now has a scar; that is quite natural. *Acne vulgaris* is a postular disease, not like *rosacea*, which is on the skin, and red. *Acne vulgaris* punches out tissue like smallpox, and after you get through healing the *acne*, itself, there is absolutely certain to be crater-formed pits, marks, and scars as in smallpox. I saw him in May, but not as a patient, as he was through treatment; I gave him some medicine for an internal condition, but I didn't even charge him for it.

(Testimony of Dr. W. T. S. Vincent.)

The witness was then cross examined:

“Mr. Zirpoli: Q. Doctor, you say that he has those scars and he has those indentations as a result of this *aene vulgaris*? A. He has.

“Q. Is that correct? A. It is.

“Q. In other words, Colusa Oil, then, did not restore the natural skin surface over where the scars were and the indentations were, did it?

“A. I would like to answer that in some way besides Yes and No.

“Mr. Gleason: Go ahead; you can answer.

“Mr. Zirpoli: Q. I know; but did or did not it restore the natural skin surface?

“A. It couldn't do it, nor any other remedy.”

At this point the defendants rested, and the Government commenced its rebuttal by calling

HOMER H. BAUMGARTNER,

who testified:

I live in Los Angeles; in looking at Defendants' Exhibit O I recognize it as a photograph of my hands and also my signature; one shows my hands as of February 28th and the other as of March [123] 11th; I went to see Mr. Colgrove about Colusa Oil; I took it home and put it on my hands; I used an electric lamp with it, which was given me by Dr. Lilliquist, a dentist; I would put the oil on my hands and then use the lamp for the heat; I did this about every half hour. I went back after twelve days and had the second photograph taken;

(Testimony of Homer H. Baumgartner.)

the back of my hands were all cleared up. I returned later, but the palms of my hands were still sore; they got better, but still not cleared up; my hands got worse than appears in that picture; last Easter they were just like a piece of beefsteak; my hands are better now; I did not use Colusa Oil when my hands were like a beefsteak. On February 28th, the back of my hands itched and burned both; the oil itself did not relieve the itching, but the oil and lamp did.

On cross examination, the witness further testified:

Dr. Lilliquist was not my dentist; he was a friend who belonged to the same church that I did; I suffered for quite a long time before I met Mr. Colgrove; I went to the dentist, Dr. Lilliquist and asked him to help me, to look at my teeth; while in his office, he phoned Mr. Colgrove and made an appointment for me to see him; I went over and met Mr. Colgrove; my hands were then in the condition as shown on the left-hand side of Defendants' Exhibit O; at that time they itched and burned very badly; I met Mr. Colgrove in the Palace Hotel, on Vine Street, in Hollywood, and he gave me this oil; Dr. Lilliquist gave me the lamp the next morning after I saw Colgrove; the oil and the lamp did the work, relieving me for the time being from the itching and torment; I then had had this disease for sixteen years; I previously had gone to doctors, but they had not cured this

(Testimony of Homer H. Baumgartner.)

disease; they did not give me as much relief as I got from Colusa Oil; with the oil and lamp together I got relief for a short period; I never tried the lamp alone before nor since.

On redirect examination the witness testified:

[124]

“Mr. Zirpoli: Now, just one question.

“Q. You returned the lamp to this dentist, is that correct? A. Yes, sir.

“Q. And he asked you about Colusa Oil. Did you try anything else that anyone else has given you since?

“A. Since then Mother sent me some salve from back home.

“Q. Your own mother did? A. Yes.

“Q. All right. And since did you cause your teeth to be extracted?

“Mr. Doyle: We object to that.

“The Witness: I didn’t get that.

“Mr. Zirpoli‘ Q. Did you?

“A. I didn’t get what you said there.

“Q. Did you cause your teeth to be extracted?

“A. I did have my teeth extracted since.

“Q. What has been your general physical condition since the extraction of the teeth?

“A. Quite a bit better.

“Mr. Zirpoli: That is all.

“Mr. Gleason: That is all.”

AMOS J. GUIDRY

was then called as a witness by the Government, and testified as follows:

I reside in Houston, Texas; I took treatment for acne; I visited Dr. Vincent, who has been a witness here.

“Mr. Zirpoli: Q. How long did you go to him and were you in his care with relation to treatment for acne?

“A. Well, about eight or ten months, I imagine; something like that.

“Q. Did he at any time use Colusa Oil in the treatment of you? A. Yes, sir.

“Q. And in treating you with Colusa Oil did he do anything else or prescribe anything else?

“A. What do you mean, the treatment I was given?

“Q. Yes.

“A. I was given something else besides that.

“Q. What did he do besides give you Colusa Oil at that time? [125]

“A. He put me on a diet and he used shots.

“Q. Injections? A. Injections.

“Q. In your bloodstream? A. Yes, sir.

“Q. In other words, where? In your arm?

“A. In my arm and back.

“Q. Did you observe any change in your condition of acne from the use of Colusa Oil?

“A. No, sir.

“Q. Did you observe any change for the better?

(Testimony of Amos J. Guidry.)

“A. I can’t see where it helped me.” [126]

On cross examination the witness testified further:

I had suffered from acne about six to eight months before I saw Dr. Vincent; I was then twenty-nine years of age, single; I had only used different salves I had bought at drug stores; I don’t remember the names of any salves I used; none of them helped me or gave me relief.

Yes, when I first saw Dr. Vincent my face was in bad shape, being broken out generally all over my face; it was much worse than it is today. Yes, when I first called on Dr. Vincent I was ashamed to go out on the street; it was itchy; that was caused by some sweets I had eaten; by cutting out some things and then eating lots of it another day, it would itch some more, and then when I watched my diet, the condition improved; I first discovered that a good while afterwards, after I had been going to Dr. Vincent; I discovered it was my diet, that some things made me get worse; *Jell-O*, ice cream, desserts, pastry; saccharin in coffee made the condition worse. About a year and a half ago I saw Dr. Gandy, which was about five months after I started with Dr. Vincent; my face was in bad shape again; Dr. Gandy gave me some radium treatments and a strict diet; he didn’t cure it; my face cleared up on the outside; I lost a lot of weight, and he said he would have to feed me some starchy foods, boiled potatoes with their jackets on; while

(Testimony of Amos J. Guidry.)

treating with Dr. Gandy, my weight went from 165 to 145 pounds; this condition came back after I stopped going to Dr. Gandy; I stopped treatments with him about six months ago. I treated with him for three months, twelve radium treatments, one each week; since that time I have treated with no other doctor; I haven't used Colusa Oil since I treated with Dr. Vincent. I couldn't tell you when I started treating with Dr. Vincent whether applying Colusa Oil eased the itching.

"Mr. Doyle: Q. It is a fact, is it not, that prior to the [127] time you treated with Dr. Vincent, you had not found or discovered any treatment or preparation which gave you relief from the itching of the acne that you had; that is true, isn't it?"

Yes, I couldn't find anything. Anything I put on my face, it seemed like it made it worse, any ointment or anything. No, the Colusa Oil did not make the itching worse. My present occupation is grocery clerk.

On redirect examination, the witness testified:

Yes, the condition of my face was worse in appearance when I left Dr. Vincent than it is now.

HARRY Y. ANDERSON

was then called as a witness by the Government and testified as follows:

I reside in Ephriam, Utah; I had occasion to use Colusa Oil in May, 1941; I applied it to the joints

(Testimony of Harry Y. Anderson.)

of my arms; they were red and watery-like; the condition was eczema; I used Colusa Oil for a week; I noticed no difference or improvement in the condition; the oil did not stop the itching.

On cross examination the witness testified:

I did not use the oil after the week; I would say I applied it about twelve times altogether; I had this condition for about two weeks before I tried the oil; I have not had it since; it went away about three weeks after I used this oil; I used a home remedy, sulphur and lard; I am a carpenter; I got Colusa Oil at the drugstore in Ephriam, where I live. This condition was on the inside of my arm, in the region of my elbow; it did not run up to my shoulder; I once had this condition years before; a doctor gave me some black salve, and that fixed it up after a month's treatment; I have had no attacks since the Spring of 1941; Colusa Oil did not stop the itching or burning. The Colusa Oil did not help me at all in my opinion.

On redirect examination, the witness testified as follows:

There was an improvement in the condition of my arms after the use of sulphur and lard. [128]

MRS. MARY ELLEN HOSFORD

was then called as a witness by the Government, and testified as follows:

I reside in Boise, Idaho; I had occasion to use

(Testimony of Mrs. Mary Ellen Hosford.)

Colusa Oil in July and August, 1941, for psoriasis on my legs and arms; I used the oil for a month and a half; there was no change as far as better; it made the spots of my legs very sore; there was no improvement; I still have that condition on my legs.

The witness testified on cross examination as follows:

I have been afflicted with psoriasis for five years; it has come and gone; I went to four doctors for treatment, all in Boise, Idaho. One was Dr. Almond, a skin specialist; he is dead now. The prescription he gave me did not help me; I then saw Dr. West; he is a physician and surgeon; he gave me several prescriptions; just ointments; I used the ointment Dr. West prescribed; I treated with Dr. West for a couple of years; he also gave me some gold and silver injections; Dr. West didn't cure this condition; he didn't help me at all. Then I visited Dr. Simonton; he prescribed an ointment; it looked like the same thing; he also gave me some sulfanilimide and arsenic to be taken internally; he gave me some black stuff for external application. I treated with him for about a year, and the condition cleared for about a month; it had definite effects right now; I lost my skin; I got rid of my psoriasis, but it came back in about a month; the salve he gave me did not help, but the arsenic and sulfanilimide did, because I got rid of it in three days, and I wasn't using the salve at the time I took

(Testimony of Mrs. Mary Ellen Hosford.)

the internal treatment. Dr. Simonton is still practicing in Boise; I tried his treatment again and the second time it didn't work. Then I went to Dr. Beck in Boise; he examined me but did not prescribe; he said, "The medical profession doesn't know anything to do for it." He said, "I could give you salves; I could prescribe for you, but there isn't anything to do for psoriasis." I also saw Dr. Smith, our family doctor, and he told me the same [129] thing. I have just lately called on Dr. Smith; he said he could give me all kinds of prescriptions, but that they wouldn't help me; and I said, "I know, I have spent hundreds of dollars trying to get rid of it." He said, "That is all we could do is experiment on you, because they haven't found anything yet to cure it."

It was after Dr. Beck told me there was nothing he could do that I acquired Colusa Oil; I bought it in a drugstore in Boise; the druggist asked me to try it; I used Colusa Oil for a month and a half. I tried to use it according to directions; it said "apply morning and night", but it made my legs too sore to do that, so then I stopped using it both day and night and just tried it once a day, and even then it made my legs too sore, and so I just used it occasionally, maybe once every two or three days after that, for about a month and a half, until I had used practically all of the bottle, and I went back to the druggist and said, "It didn't help me at all." I asked for a refund of my money and he gave it to me.

WILLIAM MILNE

was then called as a witness on behalf of the Government and testified as follows:

I reside in Chicago, Illinois; I have suffered from varicose ulcers; I used Colusa Oil in September, 1940, for about two and a half weeks for this condition; there was no improvement from the use of the oil. I have since had surgery and the ulcers healed up.

On cross examination the witness testified:

I had these ulcers for twenty-five years; they would heal up in periods and come back again; I had ulcers on both legs; during that period I treated with various doctors; I went to the Cook County Hospital; that is a very famous hospital in Chicago; I was a day patient in the clinic; there was no special department for varicose ulcers, but there were others with the same condition who attended the same department I did; I went to the [130] dispensary where they put zinc salve on and bound up the leg; no doctor ever gave me relief over all these years; just happened to get some salve and it would heal up for about five years and then would break out again; when I used the salve the doctors gave me it would take six months to clear up the condition, and sometimes it would carry on for a year. It would take between six months and a year of such treatment to clear up.

I bought Colusa Oil in Chicago and used it only two and a half weeks; I had the surgery in August,

(Testimony of William Milne.)

1941; before having surgery, I had my legs put in casts by the Visco Corporation; before I used the Colusa Oil my legs were very sore.

DR. JOHN B. KATHE

was then called as a witness on behalf of the Government and testified as follows:

I am an inspector for the United States Food and Drug Administration and have for twenty-five years been in that employment; I had occasion to call on Dr. Woodman in his office when he was alone; I had a conversation with him, but I did not tell him he should be too busy to come to court.

On cross examination the witness testified:

I saw Dr. Woodman only once; I don't know if any other inspector called on him; I went to see him about a testimonial that he had given. I asked Dr. Woodman if he expected to attend this trial and he said he did expect to attend; I asked him about his patients, if he had seen any after giving them treatment; I talked to him about the "M.D." on that letter.

"Mr. Zirpoli: At this time, if the Court please, I wish to introduce in evidence the formula from Government's Exhibit 14 for identification, which

is the United States Pharmacopoeia, which was identified by Dr. Von Hoover.

“Mr. Gleason: I want to interpose an objection. We object to the introduction of this book or any portion of it upon the ground that it is utterly incompetent, irrelevant and immaterial. [131]

“The Court: For the purpose of the record, what is the purpose of this offer?

“Mr. Zirpoli: The purpose of this offer is this: when Dr. Von Hoover was on the stand, I asked him about the Pharmacopoeia of the United States and the Homeopathic Pharmacopoeia, and he stated there were both, and that this was the Allopath. I asked him if he could give me the formula for sulphur ointment, and he told me that the general formula contained five per cent sulphur. I want to show what the formula is in that Pharmacopoeia, which was his Bible.

“The Court: For that limited purpose I will allow it.

“Mr. Acton: May we have an exception?

“The Court: Note an exception.”

Mr. Zirpoli then read from page 424 of the Pharmacopoeia of the United States:

“Unguentum sulphuris—sulphur ointment. Sulphur ointment contains not less than 13.5% and not more than 16.5% S”—meaning sulphur. Then it gives the formula as follows: “Precipitated sulphur 15 grams; wool fat, 5 grams; yellow wax, 5 grams; white petroleum, 75 grams”—making a total of 100 grams.

Thereupon the case was submitted by both sides.

Thereupon the jury was excused and retired from the courtroom.

Thereupon, each defendant separately and duly moved the Court that it direct the jury to return a verdict of not guilty as to Count One in the information as to said defendant, on the ground that the evidence was and is insufficient to justify the return of any verdict, save and except a verdict of not guilty as to said defendant.

Thereupon the Court denied said motion of each of said defendants, which ruling was duly excepted to by each defendant. Exception. [132]

Thereupon, each defendant separately and duly moved the Court that it direct the jury to return a verdict of not guilty as to Count Two in the information as to said defendant, on the ground that the evidence was and is insufficient to justify the return of any verdict save and except a verdict of not guilty as to said defendant.

Thereupon the Court denied said motion of each of said defendants, which ruling was duly excepted to by each defendant. Exception.

Thereupon, each defendant separately and duly moved the Court that it direct the jury to return a verdict of not guilty as to Count Three in the information as to said defendant, on the ground that the evidence was and is insufficient to justify the return of any verdict save and except a verdict of not guilty as to said defendant.

Thereupon the Court denied said motion of each

of said defendants, which ruling was duly excepted to by each defendant. Exception.

Thereupon, each defendant duly moved the Court that it require the Government to elect as to which of the two alleged offenses covered by the Third Count in the information the Government desired to submit to the jury. Counsel for the defendants asserted and claimed that said Third Count charges two separate and distinct offenses, one an alleged omission of certain quantitative designations from the jars of ointment involved in said Third Count, and the second, an alleged misbranding by the making of false statements on the label and in the advertising matter accompanying said jars of ointment. This matter was fully argued by the respective counsel and then submitted. Whereupon, the Court denied these motions of the defendants, to which ruling each defendant duly excepted. Exception. [133]

Thereupon, the jury returned and the cause was argued by counsel for the Government and by counsel for the defendants, and thereupon and on June 30, 1942, the Court instructed the jury as follows:

“The Court: Ladies and gentlemen of the jury, it now becomes the duty of the Court to instruct the jury on the law of this case. It is the duty of the jury to apply the law thus given to them to the facts before them. The jury are the sole judges of the facts. It is the duty of the jury to give uniform consideration to all of the instructions

which will be given, to consider all parts of them together, and to accept such instructions as a correct statement of the law involved.

“The law under which this prosecution is brought is an act known as the Federal Food, Drug and Cosmetic Act. As far as it is pertinent to this case it provides that it shall be unlawful for any person to introduce or deliver for introduction into interstate commerce any drug that is misbranded and provides that any person who shall so violate this Act shall be guilty of a misdemeanor.

“Insofar as the definition of the term ‘drug’ is applicable to this case, the Federal Food, Drug and Cosmetic Act provides that the term means articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of diseases in man or other animals.

“I charge you that the articles involved in the three counts of the information come within this definition of a drug and are drugs within the meaning of the Act.

“The same Act further provides that a drug is misbranded if its labeling is false or misleading in any particular.

“The defendants, Empire Oil and Gas Corporation, a corporation, and Chester Walker Colgrove, its president and treasurer, have been informed against by the United States Government in [134] conformity with the regular practice in cases charging a violation of the said Federal Food, Drug and Cosmetic Act, and in that respect the Government

charges that the defendants within the jurisdiction of this Court and on or about the 31st day of January, 1941, then and there did unlawfully introduce and deliver for introduction in interstate commerce, from Berkeley, California, to Mountainair, State of New Mexico, the drugs alleged to have been so introduced and delivered for introduction in interstate commerce in each of the three counts of the information.

“It further charges that the Colusa Natural Oil referred to in the first count, when so introduced in interstate commerce, was then and there misbranded within the meaning of said Act of Congress, in that the statements on the labeling of said article and on the circular and newspaper mat accompanying the said article, regarding the efficacy of said drug in the cure, mitigation, treatment or prevention of diseases of man, were false and misleading in that the said statements represented and suggested that said drug when used alone or in conjunction with the Colusa Natural Oil capsules, would be efficacious in the treatment of eczema, psoriasis, acne, ringworm, athlete’s foot, burns, cuts, poison ivy and varicose ulcers; would act on surface skin irritations as a stimulant and would increase circulation and aid in healing; would be efficacious to relieve discomfort and pain; would be efficacious to inhibit the spreading of skin irritations and to restore the normal skin surface, and would be efficacious to kill or check disease germs; when in truth and in fact the said drug, when used

alone or in conjunction with Colusa Natural Oil Capsules, would not be efficacious in the treatment of eczema, psoriasis, acne, ringworm, athlete's foot, burns, cuts, poison ivy or varicose ulcers; would not act on surface skin irritations as a stimulant; would not increase circulation, and would not aid in healing; would not be efficacious to relieve discomfort or pain, inhibit [135] the spreading of skin irritations or restore the normal skin surface, and would not be efficacious to kill or check disease germs.

“It further charges that the Colusa Oil Capsules referred to in the second count of the information when so introduced in interstate commerce was then and there misbranded in that the statements on the labeling of said article and on the circular and newspaper mat accompanying the same, regarding the efficacy of said drug as alleged in the first count which I just stated to you, were false and misleading in the manner and in the particulars I just stated in telling about the charges under the first count.

“And in the third count the information charges that the Colusa Natural Oil Hemorrhoid Ointment referred to therein when so introduced in interstate commerce was then and there misbranded in two particulars, first, in that the statement on the label and the accompanying circular regarding the efficacy of the drug in the cure, mitigation, treatment or prevention of disease in man was false and misleading, in that the said statements represented and suggested that the drug would be efficacious in

the treatment of hemorrhoids and piles, when in truth and in fact, said drug would not be efficacious in the treatment of hemorrhoids or piles, and, second, in that it was in package form and its label did not bear an accurate statement of the quantity of the contents in terms of weight or measure.

“In this latter connection, I call your attention to the fact that a drug shall be deemed to be misbranded if in package form unless it bears a label containing an accurate statement of the quantity of the contents in terms of weight, measure or numerical count.

“I have advised you that the defendants are charged with having violated certain provisions of what is known as the Food and Drug Act, the purpose of which was and is to protect consumers [136] against impure and adulterated food and drugs, or which are misbranded or which contain misleading claims pertaining to the therapeutic and curative efficacy of the product. The prohibition of this Act is directed only against the introduction into interstate commerce of any article of food, drink, or of any drug either adulterated or misbranded. In arriving at your decision in this case, you are not concerned with the wisdom of this Act of Congress in passing the Food and Drug Act. You are only concerned with the facts in this case. You must determine what the facts are in relation to the issue which is formed by the information filed and the plea entered by the defendants.

“To this charge the defendants have pleaded Not

Guilty, and you are instructed that this plea puts in issue and is a denial of all the material allegations in the information. This places upon the Government the burden of proving the allegations of the information against the defendants beyond a reasonable doubt, and to exclude from your minds any reasonable doubt of the defendants' innocence.

"The defendants are presumed to be innocent until they are proved otherwise throughout the entire trial, and until the Government produces evidence so strong and convincing that it removes from your mind any reasonable doubt as to the defendants' guilt.

"The first count in the information charges that the defendants misbranded Colusa Natural Oil in certain respects, as particularly charged in lines 4 to 29 on page 4 of the information. The prosecution charges that the defendants represented that this oil would be efficacious in the treatment of eczema, psoriasis, acne, ringworm, athlete's foot, burns, cuts, poison ivy and varicose ulcers; and that this oil would act on surface skin irritations as a stimulant and would increase circulation and aid in healing; and would be efficacious to inhibit the spreading of skin [137] irritations and to restore the normal skin surface; and would be efficacious to kill or check disease germs; and would be efficacious to relieve discomfort and pain. The prosecution further charges that these alleged representations of the defendants were false and that therefore the Colusa Natural Oil was misbranded under the Pure

Food and Drug Act. These are the only charges with which you are concerned under the first count of this information. The Government has the burden of proving to you by competent evidence, beyond a reasonable doubt the truth of these charges.

“It is not necessary for the Government to prove the falsity of all of the aforementioned alleged representations, but it is sufficient if the Government proves to you beyond a reasonable doubt the falsity in any material respect of any of said alleged representations. The various matters and statements quoted from the label and advertising matter accompanying Colusa Natural Oil, as particularly set forth on pages 2 to 4 of the information, are not of necessity in issue in this case, except insofar as they pertain to or relate to the aforementioned charges and accusations made by the prosecution in lines 4 to 29 on page 4 of the information.

“The issue under the second count in this information is substantially the same as that under the first count, and the instructions just given to you with respect to the first count apply to, and are to be considered by you with respect to the second count. In this connection it might be noted that the charges and accusations under the second count are contained in lines 2 to 28 on page 6 of the information.

“The third count is somewhat different from the other two. It consists of two phases. The first phase is that the defendants misbranded a certain shipment to New Mexico of jars of Colusa Hemor-

rhoid Ointment. The third count charges that contained in a [138] circular enclosed with said jars was the following statement: 'For external use in relieving the discomforting irritations of hemorrhoids or piles.' The Government claims and charges that this was equivalent to a representation that said drug would be efficacious in the treatment of hemorrhoids and piles, and the Government further charges that said drug would not be efficacious in the treatment of hemorrhoids or piles. The burden is upon the prosecution to prove to you beyond a reasonable doubt the truth of both of these charges, and if they have failed to do so, you must acquit the defendants insofar as this phase of the third count is concerned.

"In the second phase of the third count the Government also charges that the defendants failed to place upon the jars of ointment shipped to New Mexico an accurate statement of the quantity of contents in terms of weight or measure. This is what is referred to as the second phase of the Third Count. Therefore, in connection with this phase of the third count, I instruct you that if you find from the evidence beyond a reasonable doubt that the defendants did that which is charged in this second phase, you shall find the defendants guilty as to that phase of the third count.

"With respect to the second phase of the third count, I direct you that the law is as follows: Section 502 (b) of the Federal Food, Drug and Cosmetic Act provides, 'A drug shall be deemed to be

misbranded, if in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count; provided, that under clause (2) of this paragraph reasonable variations shall be permitted, and exemptions as to small packages shall be established, by the regulations prescribed by the administrator.' [139]

"In this connection, I further instruct you that the Secretary of Agriculture has issued no regulation exempting small packages from bearing a label containing an accurate statement of the contents in terms of weight or measure. The only exemption for compliance with this requirement is where the information as to weight or measure cannot be made to appear on the label of the drug because of insufficient label space.

"I charge you that it is not necessary for the defendants to prove their innocence, for every person accused of crime is by law presumed to be innocent; but on the contrary, it is necessary for the Government, that is, the prosecution, to prove the guilt of the defendants to a moral certainty and beyond a reasonable doubt before such defendants may be convicted by you.

"The law presumes the defendants innocent and this presumption goes with them through all the trial and remains with them until, after a full consideration of the case, you determine the question

of their guilt. This is a substantial right of the defendants and must be given them in good faith by each and every one of you.

“The charges contained in the information put upon the prosecution the burden of proving that the defendants are guilty of the offenses charged beyond a reasonable doubt. In other words, the defendants, at the outset of this trial, are presumed to be innocent and are not required to prove their innocence. In considering the testimony in the case, you must look at the testimony and view it in the light of the presumption with which the law cloaks the defendants, that is, that they are innocent and if, after considering the testimony and the presumption of innocence, there is a reasonable doubt in your mind as to their guilt, you must determine that doubt in favor of the defendants and find them not guilty.

“You are instructed that it is the law that the jury cannot [140] act upon the mere probabilities of the case, that is to say, that the mere fact that it may appear from the evidence in this case that the defendants are probably guilty of the offenses with which they are charged is not sufficient upon which to predicate a verdict of guilty. The law requires the jury to be satisfied and convinced of the guilt of the accused before conviction, and hence, permits them to act only on evidence sufficient to produce belief and conviction, or, as expressed in the law ‘upon that degree of proof which requires conviction in an unprejudiced mind.’

“I charge you that the information in this case is not evidence against the defendants and is not to be considered by you as such. It is the mere accusation and charge that has been made against the defendants. You are not to be prejudiced against the defendants because the information is on file. It is merely a step in the procedure provided by law to bring the defendants to the bar of justice to answer for the alleged crimes.

“In determining the credibility of a witness, you will bear in mind that every witness is presumed to speak the truth; but, as experience has shown and we all know, every witness does not speak the truth, and this presumption may accordingly be overcome by the manner in which he testifies, by the character of his testimony, and by other evidence in the case.

“A witness willfully false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole of the testimony of a witness who has willfully sworn falsely to any material point.

“You are instructed that if the evidence leaves it uncertain which of the two or more inferences from the facts proved is the true inference, you must adopt the inference which is most favorable to the defendants.

“I charge you that you cannot convict the defendants on [141] suspicious circumstances no matter how strong the circumstances may be.

“Counts I and II of the information raise the

issue as to whether or not Colusa Natural Oil is efficacious in the treatment of certain diseases therein mentioned. You are instructed that the treatment of such diseases does not necessarily mean or include the curing of them. Treatment includes any alleviation or mitigation of such diseases, or the giving of relief from the pain, itching, irritations, or other discomfiture incident to such diseases.

“There is nothing peculiarly different in the way a jury is to consider the proof in a criminal case from that by which men give their attention to any question depending upon the evidence presented to them. You are expected to use your good sense, consider the evidence for the purposes only for which it has been admitted, and in the light of your knowledge of the natural tendencies and propensities of human beings, resolve the facts according to deliberate and cautious judgment; and while remembering that the defendants are entitled to any reasonable doubt that may remain in your minds, remember as well that if no such doubt remains the Government is entitled to a verdict.

“Jurors are expected to agree upon a verdict where they can conscientiously do so; you are expected to consult with one another in the jury room and any juror should not hesitate to abandon his or her own view when convinced that it is erroneous.

“In determining what your verdict shall be, you are to consider only the evidence before you. Any testimony as to which an objection was sustained,

and any testimony which was ordered stricken out, must be wholly left out of account and disregarded.

“Statements of counsel are not evidence and should not be so considered. Offers to prove certain alleged facts which may have been made in your presence are not evidence, and you should [142] not take them into consideration, nor allow yourselves to be influenced in any manner thereby. Neither should you consider any evidence stricken out by the Court. And you should not draw any conclusions or inferences from any questions asked by counsel and ruled out by the Court.

“There is no dispute that the articles of drug involved in this case were shipped by the defendants in interstate commerce at the time and to the place as in the information alleged, or that the Government obtained while such shipment was in possession of the company at Mountainair, New Mexico, the bottles and jars containing the oil, capsules, and ointment in question and bearing the labeling described in the information. You may therefore consider the first essential part of the Government’s case to be established.

“The sole and remaining question for you to determine from the evidence in this case is whether or not the drugs covered by the three counts of the information were misbranded as alleged by the Government. If you are satisfied from the evidence beyond a reasonable doubt that the articles of drug bore statements in their labeling or accompanying circulars or newspaper mat that were false or

misleading in any particular in which they are alleged in the information to be false or misleading, then the drugs in those counts wherein the labeling is so false or misleading in any particular is misbranded in the manner charged by the Government, and your verdict shall be guilty as to those counts wherein such misbranding exists. If you find from the evidence that the statements in the labeling of the drugs covered by the respective counts of the information support the therapeutic claims of the defendants and are true, then the drugs covered by those counts wherein the statements on the labeling as to therapeutic claims are true, are not misbranded, your verdict should be not guilty for all or any of those counts wherein you [143] so find."

Defendants duly excepted to the giving of the instruction set forth in the foregoing paragraph, and contended that the same was too broad in that it in effect instructed the jury that any false statement contained on the label or in the circular or newspaper mat would be sufficient to justify a conviction of the defendants. Exception.

"It is not necessary for the Government to prove that each and all of the statements of each count of the information contained on the label or in the circulars or newspaper mat are false or misleading. If the Government has established by the degree of evidence which I have explained to you, that any one material statement or representation as to the therapeutic effect of the drug upon the label

or circular or newspaper mat covered by any one count is false or misleading, then the article covered by that count is misbranded within the meaning of the Federal Food, Drug and Cosmetic Act, and you should find the defendants guilty as to such counts in which you find the article so misbranded. But if the Government has failed to establish to your satisfaction by that degree of proof and beyond a reasonable doubt any one of the charges of misbranding in any one or more of the counts, then you should acquit the defendants as to such counts.”

Defendants duly excepted to the giving of the instruction set forth in the foregoing paragraph, and contended that the same was too broad in that it in effect instructed the jury that any false statement contained on the label or in the circular or newspaper mat would be sufficient to justify a conviction of the defendants. Exception.

“The language used on the label and in the circular and newspaper mat is to be given the meaning ordinarily conveyed by it to those to whom it is addressed. It is for you to determine whether or not such language is susceptible of the construction [144] that said drug would be efficacious in the treatment of the diseases and the accomplishment of the ends alleged in the respective counts of the information.

“The Federal Food, Drug and Cosmetic Act does not make the intent with which an unlawful shipment is made, an ingredient in the offense. The intent of the defendants is immaterial.”

Defendants duly excepted to the giving of the instruction set forth in the foregoing paragraph and contended that the instruction is erroneous and misleading in that it conveyed the impression to the jury that even if the alleged misbranding charged in the information, or any thereof, was due to inadvertence of third parties and with no knowledge or intent by defendants, the defendants would still be guilty of a crime. Exception.

“Therefore, if you find from the evidence beyond a reasonable doubt that the drugs involved in the three counts of the indictment, or any of them, were in fact misbranded in the manner alleged in the information or any count thereof, you shall find the defendants guilty as charged in those counts wherein you find the drugs were misbranded, regardless of the intent in the minds of the defendants.”

Defendants duly excepted to the giving of the instruction set forth in the foregoing paragraph, and contended that it is erroneous as to the element of “intent” for the same reasons as the earlier instructions on said subject. Exception.

“If, after hearing the evidence in this case, you reach the conclusion that the drugs or products involved here were harmless, that does not excuse the defendants, if you find that they placed statements upon said drugs which were false, concerning the curative and therapeutic effects of such products, as the danger and injury to the public from representations of this type is in that it induces persons frequently to rely in serious cases upon

preparations without healing virtue when, but for this [145] reliance, they would secure proper advice and treatment for the ills which affect them.”

Defendants duly excepted to the giving of the instruction set forth in the foregoing paragraph, and contended that it is too broad in that it conveyed to the jury the idea that if any false statement accompanied said drugs, the defendants should be convicted, instead of limiting the charge to the alleged false statement specifically charged in the information. Exception.

“In discharging your duty as judges of the facts in this case, you may take into account the intelligence or lack of intelligence displayed by any witness, the opportunity or lack of opportunity on the part of any witness to know or be informed about the matters upon which he testifies. You may also take into account the interest any witness may have in the outcome of the case, and weigh his testimony accordingly.

“Ordinarily, in the trial of cases in court, witnesses are confined in their testimony to facts within their personal knowledge and they are not permitted to draw conclusions or express opinions. That is the general rule, but there is an exception to that rule where the points in issue arise out of a particular science or art concerning which there are trained minds who have special knowledge, learning or schooling in that particular field. Such persons are called experts and because of that special training or learning they are entitled to express

opinions concerning the matters at issue. You will, of course, weigh and evaluate the testimony of the expert witnesses in this case precisely as you weigh the testimony of any non-expert witnesses; that is to say, you will take into account the probability and reasonableness of the matters to which they have testified, the schooling of the persons giving it, the learning that he has in his profession, or the want of it, and the breadth of his experience in the field which would enable him to arrive at a correct conclusion. In [146] other words, his testimony should be given such weight as you believe it is entitled to receive.

“Although as men and women you may sympathize with those who suffer, yet as honest men and women, bound by oath to administer justice according to the law and the evidence, you should not act on your sympathies without proof. Mercy does not belong to you. No question of mercy, sentiment, or anything else, resides with you, except the question of whether or not you believe from the evidence and beyond a reasonable doubt that the defendants are guilty. Duty demands it and law requires that you must be just to the defendants and equally just to the Government. As upright jurors, charged under your oath with the responsible duty of assisting the Court in the administration of justice, you will put aside all sympathy and sentiment, all question of public approval or disapproval, and look steadfastly to the law and the evidence in the case and return into court such a verdict as is warranted by the law and the evidence.

“You are instructed that if the Judge has said anything or done anything which has suggested to you that he is inclined to favor the claims or position of either party, you will not suffer yourselves to be influenced by any such suggestion.

“The verdict to be rendered must represent the considered judgment of each juror.

“In order to return a verdict it is necessary that each juror agree thereto. Your verdict must be unanimous.

“When you return to your jury room to deliberate, you will select one of your number as foreman and he will sign your verdict for you when it has been agreed upon. You will then return into court with the verdict and your foreman will represent you as your spokesman in the further conduct of this case in this court.

“That, ladies and gentlemen of the jury, concludes the instructions of the Court.” [147]

Thereupon, and in the presence of the jury, and before its retirement, defendants duly excepted to the instructions as specifically shown hereinabove, and in addition duly excepted to the refusal of the Court to give certain instructions previously submitted and requested by defendants, as follows:

Defendants’ Proposed Instruction No. 21, which is as follows:

“To constitute a party guilty of crime, the evidence must show intentional participation in the attempt to violate the statutes in question.”

Defendants' Proposed Instruction No. 22, which is as follows:

"There must be an intentional participation in the transaction with a view to the common design and purpose, before a party can be guilty of crime."

Defendants' Proposed Instruction No. 29, which is as follows:

"In this case Mr. Colgrove is jointly charged with the defendant corporation in the information. However, you are instructed that it is the law that an officer of a corporation—and here Mr. Colgrove is President of the corporation—cannot be held liable unless he personally knowingly and actually participates in the commission of the acts alleged to be unlawful. An officer of a corporation is not criminally liable for the acts of the corporation performed by other officers or agents. Therefore, unless you find that Mr. Colgrove did know that the jars of ointment referred to in the third count of the information had not been properly labeled, but that the jars of ointment with the incomplete label had been shipped by clerks and employees of the corporation without Mr. Colgrove's knowledge, then and in that event you will find Mr. Colgrove personally not guilty. *State v. Parker*, 151 Atl. at 332; *Fletcher Cyc. Corpn.* Vol. 3, Sec. 1349."

It was thereupon stipulated between the respective parties that defendants had duly excepted to the various instructions specifically mentioned hereinabove as having been excepted to, [148] and to the rulings of the Court in connection therewith.

Thereupon, at the hour of 2:15 p.m. of said day, June 30, 1942, the jury retired for deliberation, and and at 2:55 P.M. of said day, the jury returned to the courtroom and delivered their verdict as follows:

“No. 27554-R

“We, the jury, find as to the defendants at the bar as follows:

The Empire Oil and Gas Corporation, a corporation,

Guilty on the first count,

Guilty on the second count,

Guilty on the third count.

Chester Walker Colgrove, trading as Colusa Products Company,

Guilty on the first count,

Guilty on the second count,

Guilty on the third count.

P. N. DOWNING,

Foreman”

Thereafter, and on July 8, 1942, each of the defendants duly moved the Court for a new trial, said motion being as follows:

[Title of Court and Cause.]

“MOTION FOR NEW TRIAL

“Now come the defendants in the above entitled case, and respectfully move the Court to grant a new trial of said cause, and as ground therefore, respectfully show as follows:

“1. That on the trial the Court admitted improper evidence against the defendants, over the objection of defendants, which rulings were duly excepted to by the defendants.

“2. That on the trial the Court refused to admit evidence and testimony offered by defendants which was competent and relevant to the issues in this case, to which rulings defendants duly excepted.

“3. That the verdict under the first count is contrary to the evidence.

“4. That the verdict under the second count is contrary to the evidence. [149]

“5. That the verdict under the third count is contrary to the evidence.

“6. That the verdict under the first count is contrary to the law.

“7. That the verdict under the second count is contrary to the law.

“8. That the verdict under the third count is contrary to the law.

“9. That the verdict should have been for the defendants as to each of said counts.

“10. That the Court erred in denying defendants’ motion for a directed verdict of not guilty under the first count.

“11. That the Court erred in denying defendants’ motion for a directed verdict of not guilty under the second count.

“12. That the Court erred in denying defendants’ motion for a directed verdict of not guilty under the third count.

“13. That the Court erred in denying defend-

ants' motion that plaintiff be compelled to elect between the two separate alleged offenses set forth in the third count.

"14. That the Court erred upon the trial of said cause in deciding questions of law arising during the course of the trial, which errors were duly excepted to.

"Dated: July 8, 1942.

WALTER M. GLEASON

MORGAN J. DOYLE

WILLIAM B. ACTON

Attorneys for Defendants.

"Service of the foregoing Motion for New Trial, and copy thereof, this 8th day of July, 1942, is hereby acknowledged.

FRANK J. HENNESSY,

U. S. Attorney

By A. J. ZIRPOLI"

Said motion was then argued and submitted, and thereafter, on said date, the Court denied said motion for a new trial, to which ruling an exception was duly taken by each defendant. Exception. [150]

Thereupon, on said day, each defendant duly moved the Court in arrest of judgment, which motion was as follows:

[Title of Court and Cause.]

"MOTION OF DEFENDANTS IN ARREST
OF JUDGMENT

"Now comes the defendants in the above entitled proceeding, and respectfully move the above entitled

Court in arrest of judgment, and that judgment be arrested and not entered herein, and as grounds of said motion, state as follows:

I

“That the information filed in this case does not state facts sufficient to constitute a public offense by these defendants, or otherwise.

II

“That the first count in the information filed in this case does not state facts sufficient to constitute a public offense by these defendants, or otherwise.

III

“That the second count in the information filed in this case does not state facts sufficient to constitute a public offense by these defendants, or otherwise.

IV

“That the third count in the information filed in this case does not state facts sufficient to constitute a public offense by these defendants, or otherwise.

V

“That the third count purports and attempts to state two separate and distinct public offenses, to-wit, an alleged offense consisting of the alleged failure to state on the labels of the jars or packages of ointment referred to in said count the quantity of ointment contained therein; and a separate and distinct offense consisting of the alleged mis-

branding of said ointment by the alleged making of false statements concerning the therapeutic efficacy of said ointment. [151]

“That the Court erred in denying defendants’ motion to compel plaintiff to elect as between said two distinct alleged offenses set forth in said third count.

VI

“That said information was not verified.

“Wherefore, defendants pray that this said motion in arrest of judgment be granted as to each of said defendants.

“Dated July 8, 1942.

WALTER M. GLEASON

MORGAN J. DOYLE

WILLIAM B. ACTON

Attorneys for Defendants

“Service of the foregoing Motion of Defendants in Arrest of Judgment, and copy thereof, this 8th day of July, 1942, is hereby acknowledged.

FRANK J. HENNESSY,

U. S. Attorney

By A. J. ZIRPOLI”

Thereupon, on said day, the Court denied said motion in arrest of judgment, to which ruling an exception was duly taken by each defendant. Exception.

Thereafter, and on July 8, 1942, the Court imposed judgment and sentence upon the defendants as follows:

As to the defendant Chester Walker Colgrove, the Court sentenced said defendant to pay a fine of \$500.00 (or in the alternative serve six months in jail) as to each of the three counts in the information.

Said defendant duly excepted to the rendering of said judgment and sentence and each and all portions thereof. Exception.

As to the defendant Empire Oil and Gas Corporation, the Court imposed a fine of \$1.00 as to each of the said three counts.

Said defendant duly excepted to the rendering of said judgment and each and all portions thereof. Exception. [152]

Thereafter, and on July 9, 1942, said defendants paid into escrow, with the Clerk of said United States District Court, said total fines provided for in and by said sentence and judgment of said Court aforementioned, under and pursuant to an order of said Court, duly made on July 9, 1942, which order provided that said fines be held in escrow pending the appeal of said defendants from said judgment.

Said defendants and each thereof duly filed in said cause their notices of appeal on the 9th day of July, 1942.

Thereafter and on the 20th day of July, 1942, the Court made its order that defendants and appellants have to and including September 15, 1942, within which to file their assignment of errors and proposed bill of exceptions.

Thereafter, and on the 10th day of September, 1942, the parties duly stipulated that the time within which the proposed bill of exceptions and assignment of errors of the defendants and appellants be filed, be extended to and including September 30, 1942, and thereupon the Court duly made its order extending said time as thus stipulated. That in and by its said last named order, said Court did further provide that the appellee should have to and including October 15, 1942, within which to file its proposed amendments, and that the time for the settlement of said bill of exceptions by the Court be extended to and including October 30, 1942.

Thereafter, and on September 29, 1942, an order was duly entered of record, pursuant to the stipulation of the parties hereto, that the certain original documents and exhibits offered in evidence in said cause, which are not herein reproduced, be considered as incorporated and as a part of the bill of exceptions in this cause as though actually a physical part thereof, and that the same be separately certified by the Clerk of this Court to the United States Circuit Court of Appeals for the Ninth Circuit. [153]

Accordingly, said exhibits which are not set forth in this bill of exceptions, the same being separately certified by the Clerk of this Court to the United States Circuit Court of Appeals, in and for the Ninth Circuit of the United States, are hereby referred to and incorporated and included herein,

and made a part hereof, the same as if actually herein set out in full.

Wherefore, said defendants and appellants hereby tender, with said original exhibits aforementioned, this as their bill of exceptions, which said proposed bill of exceptions is all of the evidence received in said cause, and respectfully pray that the same may be allowed, settled and signed by the Judge of this Court, as provided by law and the rules of this Court, this said Bill of Exceptions being tendered to said Court this 29th day of September, 1942, which is within the time heretofore granted by the Court pursuant to the rules of Court and the statute appertaining thereto for the presenting, signing and filing of said bill of exceptions herein.

MORGAN J. DOYLE

W. B. ACTON

WALTER M. GLEASON

Attorneys for Defendants and
Appellants

It is stipulated that the foregoing Engrossed Bill of Exceptions may be settled as presented.

THOS. C. LYNCH

Service and receipt of copy of the within proposed bill of exceptions this 28th day of September, 1942 is hereby acknowledged.

FRANK J. HENNESSY,

United States Attorney

By A. J. ZIRPOLI,

Attorneys for Plaintiff and
Appellee

The foregoing Bill of Exceptions is hereby settled, and allowed this 12th day of November, 1942, which is within the time heretofore fixed (to-and-on or before November 15, 1942) for the settlement of said Bill.

MICHAEL J. ROCHE,

United States District Judge

[Endorsed] Filed Nov. 12, 1942. [154]

[Title of District Court and Cause]

VERDICT

We, the Jury, find as to the defendants at the bar as follows:

Empire Oil and Gas Corporation, a corporation,
Guilty on First Count, Guilty on Second Count,
Guilty on Third Count;

Chester Walker Colgrove, trading as Colusa
Products Company, Guilty on First Count, Guilty
on Second Count, Guilty on Third Count.

P. M. DOWNING

Foreman.

[Endorsed]: Filed June 30, 1942. [155]

[Title of District Court and Cause]

MOTION FOR NEW TRIAL

Now come the defendants in the above entitled case, and respectfully move the Court to grant

a new trial of said cause, and as ground therefor, respectfully show as follows:

1. That on the trial the Court admitted improper evidence against the defendants, over the objection of defendants, which rulings were duly excepted to by the defendants.

2. That on the trial the Court refused to admit evidence and testimony offered by defendants which was competent and relevant to the issues in this case, to which rulings defendants duly excepted.

3. That the verdict under the first count is contrary to the evidence.

4. That the verdict under the second count is contrary to the evidence. [156]

5. That the verdict under the third count is contrary to the evidence.

6. That the verdict under the first count is contrary to the law.

7. That the verdict under the second count is contrary to the law.

8. That the verdict under the third count is contrary to the law.

9. That the verdict should have been for the defendants as to each of said counts.

10. That the Court erred in denying defendants' motion for a directed verdict of not guilty under the first count.

11. That the Court erred in denying defendants' motion for a directed verdict of not guilty under the second count.

12. That the Court erred in denying defendants' motion for a directed verdict of not guilty under the third count.

13. That the Court erred in denying defendants' motion that plaintiff be compelled to elect between the two separate alleged offenses set forth in the third count.

14. That the Court erred upon the trial of said cause in deciding questions of law arising during the course of the trial, which errors were duly excepted to.

Dated: July 2, 1942.

MORGAN J. DOYLE

WILLIAM B. ACTON

WALTER M. GLEASON

Attorneys for Defendants

Service of the foregoing Motion for New Trial, and copy thereof, this 8th day of July, 1942, is hereby acknowledged.

FRANK J. HENNESSY,

U. S. Attorney

By A. J. ZIRPOLI

[Endorsed]: Filed July 3, 1942. [156-A]

[Title of District Court and Cause.]

MOTION OF DEFENDANTS IN
ARREST OF JUDGMENT

Now come the defendants in the above entitled proceeding, and respectfully move the above enti-

tled Court in arrest of judgment, and that judgment be arrested and not entered herein, and as grounds of said motion, state as follows:

I

That the information filed in this case does not state facts sufficient to constitute a public offense by these defendants, or otherwise.

II

That the first count in the information filed in this case does not state facts sufficient to constitute a public offense by these defendants, or otherwise. [157]

III

That the second count in the information filed in this case does not state facts sufficient to constitute a public offense by these defendants, or otherwise.

IV

That the third count in the information filed in this case does not state facts sufficient to constitute a public offense by these defendants, or otherwise.

V

That the third count purports and attempts to state two separate and distinct public offenses, to-wit, an alleged offense consisting of the alleged failure to state on the labels of the jars or packages of ointment referred to in said count the quantity of ointment contained therein; and a separate and distinct offense consisting of the al-

leged misbranding of said ointment by the alleged making of false statements concerning the therapeutic efficacy of said ointment.

That the Court erred in denying defendants' motion to compel plaintiff to elect as between said two distinct alleged offenses set forth in said third count.

VI

That said information was not verified.

Wherefore, defendants pray that this said motion in arrest of judgment be granted as to each of said defendants.

Dated: July 2, 1942.

MORGAN J. DOYLE

WILLIAM B. ACTON

WALTER M. GLEASON

Attorneys for Defendants

Service of the foregoing Motion of Defendants in Arrest of Judgment, and copy thereof, this 3rd day of July, 1942 is hereby acknowledged.

FRANK J. HENNESSY,

U. S. Attorney

By A. J. ZIRPOLI

[Endorsed]: Filed Jul. 3, 1942. [157-A]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of
the United States District Court for the Northern

District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday the 8th day of July, in the year of our Lord one thousand nine hundred and forty-two.

Present: The Honorable Michael J. Roche, District Judge.

No. 27554-R

UNITED STATES OF AMERICA,

vs.

EMPIRE OIL AND GAS CORPORATION, a corporation, and CHESTER WALKER COL-GROVE, trading as Colusa Products Company

MINUTE ORDER

Denying Motion for New Trial and
Motion in Arrest of Judgment

This case came on this day for the pronouncing of judgment, for hearing on the motion for new trial, and motion in arrest of judgment. The defendants were present with Morgan J. Doyle, Walter Gleason and William B. Acton, Esqrs., their Attorneys. A. J. Zirpoli, Esq., Assistant United States Attorney, was present for and on behalf of the United States. After argument by Mr. Acton and Mr. Gleason, on behalf of the defendants, and by Mr. Zirpoli on behalf of the United States, it is ordered that the said motion for a new trial be and the same is hereby denied, and defendants

allowed an exception to the ruling of the Court; and it is ordered that the motion in arrest of judgment be and the same is hereby denied, and defendants allowed an exception to the ruling of the Court. The defendants were called for judgment. After hearing the Attorneys, and the defendants having been now asked whether they have anything to say why [158] judgment should not be pronounced against them, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court * * * [159]

In the Southern Division of the United States
District Court for the Northern District of
California.

No. 27554-R

Criminal Information in Three Counts for Viola-
tion of Federal Food, Drug, and Cosmetic Act
(52 Statutes at Large, 1040; 21 USC 331(a),
352(a), (b)(2),)

UNITED STATES OF AMERICA

vs.

EMPIRE OIL AND GAS CORPORATION, a
corporation.

JUDGMENT

On this 8th day of July, 1942, came the United
States Attorney, and the defendant, Empire Oil &

Gas Corporation, a corpn. appearing thru Chester W. Colgrove, its President and by counsel and,

The defendant having been convicted on verdict of guilty of the offense charged in the Information in the above-entitled cause, to-wit:

Federal Food, Drug and Cosmetic Act (52 Statutes at Large, 1040; 21 USC 331(a), 352 (a), (b)(2),)

and the defendant being now asked whether it has anything to say before the judgment is pronounced against it and no sufficient cause being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant be and it hereby is sentenced to pay a fine to the United States of America in the sum of One and No/100 Dollar (\$1.00) on each of Counts I, II and III, making a total of Three and No/100 Dollars (\$3.00).

MICHAEL J. ROCHE

United States District Judge

Examined by:

A. J. ZIRPOLI

Assistant United States Attorney.

Entered in Vol. 32 Judg. and Decrees at Page 862.

[Endorsed]: Filed July 8, 1942. [160]

In the Southern Division of the United States
District Court for the Northern District of
California

No. 27554-R

Criminal Information in Three Counts for Viola-
tion of Federal Food, Drug, and Cosmetic Act
(52 Statutes at Large, 1040; 21 USC 331(a),
352(a), (b)(2),)

UNITED STATES OF AMERICA

vs.

CHESTER WALKER COLGROVE, trading as
Colusa Products Company.

JUDGMENT

On this 8th day of July, 1942, came the United States Attorney, and the defendant, Chester Walker Colgrove, appearing in proper person, and by counsel, and,

The defendant having been convicted on verdict of guilty of the offense charged in the Information in the above-entitled cause, to-wit:

Federal Food, Drug, and Cosmetic Act (52 Statutes at Large, 1040; 21 USC 331(a), 352 (a), (b)(2),)

and the defendant being now asked whether he has anything to say before judgment is pronounced against him and no sufficient cause being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant be and he hereby is sentenced to pay a fine to the

United States of America in the sum of Five Hundred and No/100 Dollars (\$500.00) and that said defendant be imprisoned in a Jail to be designated by the Attorney General or his authorized representative for the period of Six (6) Months on Count I of the Information; that he pay a Fine to the United States of America in the sum of Five Hundred and No/100 Dollars (\$500.00) and that said defendant be imprisoned in a Jail to be designated by the Attorney General or his authorized representative for the period of Six (6) Months on Count II of the Information; that he pay a Fine to the United States of America in the sum of Five Hundred and No/100 Dollars (\$500.00) and that said defendant be imprisoned in a Jail to be designated by the Attorney General or his authorized representative for the period of Six (6) Months on Count III of the Information; It Is Further Ordered that the periods of imprisonment imposed on said defendant, Chester Walker Colgrove on Count I, Count II and Count III commence and run concurrently; It Is Further Ordered that the defendant Chester Walker Colgrove, upon the payment of the said Fines imposed on him, on Count I, on Count II, and on Count III, be discharged from imprisonment on said Counts.

It Is Further Ordered that the Clerk deliver certified copy of this Judgment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

MICHAEL J. ROCHE

United States District Judge

Examined by:

A. J. ZIRPOLI

Assistant United States Attorney.

Entered in Vol. 32 Judg. and Decrees at Page
863.

[Endorsed]: Filed July 8, 1942. [161]

In the District Court of the United States Within
and for the Northern District of California,
Southern Division.

March Term, 1942

No. 27554-R

UNITED STATES OF AMERICA

v.

EMPIRE OIL AND GAS CORPORATION, a
corporation, and CHESTER WALKER COL-
GROVE, trading as Colusa Products Company

NOTICE OF APPEAL OF EMPIRE OIL
AND GAS CORPORATION

Name and Address of Appellant:

Empire Oil and Gas Corporation, a corporation,
503 Mercantile Bldg., Shattuck and Center Streets,
Berkeley, California.

Names and Addresses of Appellant's Attorneys:

Walter M. Gleason and Morgan J. Doyle, 2314
Shell Building, San Francisco, California, and
William B. Acton, 486 California Street, San
Francisco, California.

Offense:

Alleged violation of Federal Food, Drug and Cosmetic Act (52 Statutes at Large, 1040; 21 U.S.C. 331(a), 352(a)). Information contains three counts. First charges shipment of misbranded oil in interstate commerce. Second Count charges shipment of misbranded capsules in interstate commerce. Third Count charges shipment of misbranded ointment in interstate commerce, all in violation of said statute aforementioned. [162]

Date of Judgment:

July 7, 1942.

Brief Description of Judgment or Sentence:

\$1.00 Fine, First Count;

\$1.00 Fine, Second Count;

\$1.00 Fine, Third Count.

Name of Prison Where Now Confined if Not on Bail:

The above named appellant hereby appeals to the United States Circuit Court of Appeals, for the Ninth Circuit, from the judgment above mentioned on the grounds set forth below.

Dated: July 7, 1942.

EMPIRE OIL AND GAS CORPORATION,

[Seal] By C. W. COLGROVE
Its President

By H. C. COLGROVE
Its Secretary
Appellant

GROUNDS OF APPEAL

(1) That the First Count in the information filed in this case does not state facts sufficient to constitute an offense by appellant against the laws of the United States of America.

(2) That the First Count in the information filed in this case does not state facts sufficient to constitute an offense by appellant under the Federal Food, Drug and Cosmetic Act.

(3) That the Second Count in the information filed in this case does not state facts sufficient to constitute an offense by appellant against the laws of the United States of America.

(4) That the Second Count in the information filed in this case does not state facts sufficient to constitute an offense by appellant under the Federal Food, Drug and Cosmetic Act.

(5) That the Third Count in the information filed in [163] this case does not state facts sufficient to constitute an offense by appellant against the laws of the United States of America.

(6) That the Third Count in the information filed in this case does not state facts sufficient to constitute an offense by appellant under the Federal Food, Drug and Cosmetic Act.

(7) That the Third Count attempts and purports to allege two separate and distinct offenses in one count, and the Court erred in denying appellant's motion to compel the prosecution to elect as to which of said alleged offenses it would proceed under and submit to the jury.

(8) That the evidence is insufficient as a matter of law to sustain the verdict against appellant on the First Count.

(9) That the evidence is insufficient as a matter of law to sustain the verdict against appellant on the Second Count.

(10) That the evidence is insufficient as a matter of law to sustain the verdict against appellant on the Third Count.

(11) That the verdict on the First Count is against the law.

(12) That the verdict on the Second Count is against the law.

(13) That the verdict on the Third Count is against the law.

(14) That the Court erred in denying appellant's motion for a directed verdict of not guilty on the First Count.

(15) That the Court erred in denying appellant's motion for a directed verdict of not guilty on the Second Count.

(16) That the Court erred in denying appellant's motion for a directed verdict of not guilty on the Third Count.

(17) That the Court erred in denying appellant's motion for a new trial.

(18) That the Court erred in denying appellant's motion in arrest of judgment. [164]

(19) That the Court committed various errors at the trial of this case in admission, over the objection of appellant, of evidence and testimony offered by the government, and in the rejection of evidence and testimony offered by defendants, all of which said errors will be particularly specified and pointed out in the Assignment of Errors to be filed hereafter. Included among these errors, and as some of the prejudicial errors of the Court which appellant will particularly assign and specify hereafter in the Assignment of Errors, are the following:

(a) The Court erred in refusing to permit Dr. Von Hoover, one of appellant's expert witnesses, to give his opinion as to certain of the technical points in issue in this case, and as to which he was fully qualified.

(b) The Court erred in refusing to permit Dr. Von Hoover to testify, from the original memorandum prepared by him at the conclusion of his extensive clinical tests made of the products involved in this case to determine their therapeutic value and properties, as to the detailed facts and data learned, observed and compiled by him in the making of said tests.

(c) The Court erred in holding that the testimony of this witness, Dr. Von Hoover, would be restricted and limited to what he actually saw and observed, and in precluding and preventing him from stating what skin diseases certain clinical patients were suffering from.

(d) The Court erred in making various remarks

in connection with the testimony of Dr. Von Hoover which tended to, and did, create in the minds of the jury the impression that the testimony of this witness was of little value and entitled to little weight, when in fact this witness was fully qualified as a scientist, and by his training and practice of his profession as a pharmacologist to testify as an expert on the subject involved, and actually made detailed and exhaustive tests with respect to [165] the very products involved in this case and the very issues involved herein.

(e) That in view of the issues raised by the information in this case, the Court erred in refusing to admit in evidence the voluntary testimonials received by the defendants, and upon the basis of which they made certain statements, quoted in their advertising matter and in the information, and which statements the information charges to be false.

(f) That the Court erred in ruling that the defendants would not be permitted to show that the omission, from the jar of ointment covered by the Third Count, of the weight designation, viz. " $\frac{3}{4}$ ounce" was entirely inadvertent, and was due to an inadvertence of the printing company which printed these labels; and that said company inadvertently, in printing said labels, failed to comply with the written request and instructions of appellant that this designation, " $\frac{3}{4}$ ounce" be printed on the label as per the copy submitted.

(g) The Court erred in holding that the intent, belief or knowledge of the defendants in connec-

tion with the aforementioned omission from the label on the jar of ointment covered by Count Three was and is immaterial.

(h) The Court erred in permitting, over objection of appellant, various witnesses for the government to testify as to the effect of the application of the Colusa Natural Oil to the human skin without a proper foundation being laid to show that such witnesses had made the necessary tests to enable them to testify as to such facts.

(i) The Court erred in permitting, over objection of appellant, the government to ask and receive answers to various leading questions covering important matters in issue in this case, all to be particularly specified in the Assignment of Errors to be filed hereafter. [166]

(j) The Court erred in refusing to admit in evidence various documentary evidence and exhibits offered by appellant.

(k) The Court erred in rejecting various offers of proof made by appellant with respect to material issues in this case, including the offer to prove various facts concerning the voluntary testimonials received by defendant in relation to the money back guaranty under which these products were sold, all of said rulings to be particularly specified hereafter in the Assignment of Errors.

(l) The Court erred in refusing to permit defendant Colgrove to testify as to on what he based various assertions contained in the advertising matter and quoted in the information, and which the

government claimed and alleged to be false, including the statement to the effect that various users of these products had credited these Colusa products with excellent results in the treatment of certain skin diseases, and also the statement that radium emanations have certain characteristics, as quoted in the newspaper mat referred to in said information.

(m) The Court erred in permitting the government to cross-examine defendant Colgrove as to certain matters not at all relevant to the issues in this case, and not at all pertinent to the matters covered on his direct examination, to-wit, the various businesses and activities in which this defendant had previously been engaged.

(n) The Court erred in permitting the government to cross-examine defendant Colgrove as to certain letters received in evidence and marked as Government's Exhibit 13.

(20) The Court erred in giving certain instructions to the jury as requested by the plaintiff, and objected to by appellant, all to be particularly specified hereafter in the Assignment of Errors. [167]

(21) The Court erred in refusing to give certain instructions to the jury requested by appellant.

Dated: July 7, 1942.

MORGAN J. DOYLE,

WALTER M. GLEASON

WILLIAM B. ACTON

Attorneys for Appellant.

Service and receipt of copy of the foregoing Notice of Appeal is hereby acknowledged this 8th day of July, 1942.

FRANK J. HENNESSY,
United States Attorney.

By A. J. ZIRPOLI.

[Endorsed]: Filed Jul. 9, 1942. [168]

[Title of District Court and Cause.]

NOTICE OF APPEAL OF
CHESTER WALKER COLGROVE

Name and address of Appellant: Chester Walker Colgrove, 2535 Le Conte, Berkeley, California.

Names and Addresses of Appellant's Attorneys: Walter M. Gleason and Morgan J. Doyle, 2314 Shell Building, San Francisco, California, and William B. Acton, 486 California Street, San Francisco, California.

Offense: Alleged violation of Federal Food, Drug and Cosmetic Act (52 Statutes at Large, 1040; 21 U.S.C. 331 (a), 352 (a)). Information contains three counts. First Count charges shipment of misbranded oil in interstate commerce. Second Count charges shipment of misbranded capsules in interstate commerce. Third Count charges shipment of [169] misbranded ointment in interstate commerce, all in violation of said statute aforementioned.

Date of Judgment: July 7, 1942.

Brief Description of Judgment or Sentence: \$500

Fine or Six Months in jail, First Count; \$500 Fine or Six Months in jail, Second Count; \$500 Fine or Six Months in jail, Third Count.

Name of Prison Where Now Confined if Not on Bail: Bail.

The above named appellant hereby appeals to the United States Circuit Court of Appeals, for the Ninth Circuit, from the judgment above mentioned on the grounds set forth below.

Dated: July 7, 1942.

CHESTER WALKER COLGROVE

Appellant

GROUND OF APPEAL

(1) That the First Count in the information filed in this case does not state facts sufficient to constitute an offense by appellant against the laws of the United States of America.

(2) That the First Count in the information filed in this case does not state facts sufficient to constitute an offense by appellant under the Federal Food, Drug and Cosmetic Act.

(3) That the Second Count in the information filed in this case does not state facts sufficient to constitute an offense by appellant against the laws of the United States of America.

(4) That the Second Count in the information filed in this case does not state facts sufficient to constitute an offense by appellant under the Federal Food, Drug and Cosmetic Act.

(5) That the Third Count in the information filed in this case does not state facts sufficient to constitute an offense [170] by appellant against the laws of the United States of America.

(6) That the Third Count in the information filed in this case does not state facts sufficient to constitute an offense by appellant under the Federal Food, Drug and Cosmetic Act.

(7) That the Third Count attempts and purports to allege two separate and distinct offenses in one count, and the Court erred in denying appellant's motion to compel the prosecution to elect as to which of said alleged offenses it would proceed under and submit to the jury.

(8) That the evidence is insufficient as a matter of law to sustain the verdict against appellant on the First Count.

(9) That the evidence is insufficient as a matter of law to sustain the verdict against appellant on the Second Count.

(10) That the evidence is insufficient as a matter of law to sustain the verdict against appellant on the Third Count.

(11) That the verdict on the First Count is against the law.

(12) That the verdict on the Second Count is against the law.

(13) That the verdict on the Third Count is against the law.

(14) That the Court erred in denying appellant's motion for a directed verdict of not guilty on the First Count.

(15) That the Court erred in denying appellant's motion for a directed verdict of not guilty on the Second Count.

(16) That the Court erred in denying appellant's motion for a directed verdict of not guilty on the Third Count.

(17) That the Court erred in denying appellant's motion for a new trial.

(18) That the Court erred in denying appellant's motion in arrest of judgment.

(19) That the Court committed various errors at the trial [171] of this case in admission, over the objection of appellant, of evidence and testimony offered by the government, and in the rejection of evidence and testimony offered by defendants, all of which said errors will be particularly specified and pointed out in the Assignment of Errors to be filed hereafter. Included among these errors, and as some of the prejudicial errors of the Court which appellant will particularly assign and specify hereafter in the Assignment of Errors, are the following:

(a) The Court erred in refusing to permit Dr. Von Hoover, one of appellant's expert witnesses, to give his opinion as to certain of the technical points in issue in this case, and as to which he was fully qualified.

(b) The Court erred in refusing to permit Dr. Von Hoover to testify, from the original memorandum prepared by him at the conclusion of his extensive clinical tests made of the products in-

volved in this case to determine their therapeutic value and properties, as to the detailed facts and data learned, observed and compiled by him in the making of said tests.

(c) The Court erred in holding that the testimony of this witness, Dr. Von Hoover, would be restricted and limited to what he actually saw and observed, and in precluding and preventing him from stating what skin diseases certain clinical patients were suffering from.

(d) The Court erred in making various remarks in connection with the testimony of Dr. Von Hoover which tended to, and did, create in the minds of the jury the impression that the testimony of this witness was of little value and entitled to little weight, when in fact this witness was fully qualified as a scientist, and by his training and practice of his profession as a pharmacologist to testify as an expert on the subject involved, and actually made detailed and exhaustive tests with respect to the very products involved in this case and the very issues involved herein. [172]

(e) That in view of the issues raised by the information in this case, the Court erred in refusing to admit in evidence the voluntary testimonials received by the defendants, and upon the basis of which they made certain statements, quoted in their advertising matter and in the information, and which statements the information charges to be false.

(f) That the Court erred in ruling that the defendants would not be permitted to show that the omission, from the jar of ointment covered by the Third Count, of the weight designation, viz. “ $\frac{3}{4}$ ounce” was entirely inadvertent, and was due to an inadvertence of the printing company which printed these labels; and that said company, in printing said labels, inadvertently failed to comply with the written request and instructions of appellant that this designation, “ $\frac{3}{4}$ ounce” be printed on the label as per the copy submitted.

(g) The Court erred in holding that the intent, belief or knowledge of the defendants in connection with the aforementioned omission from the label on the jar of ointment covered by Count Three was and is immaterial.

(h) The Court erred in permitting, over objection of appellant, various witnesses for the government to testify as to the effect of the application of the Colusa Natural Oil to the human skin without a proper foundation being laid to show that such witnesses had made the necessary tests to enable them to testify as to such facts.

(i) The Court erred in permitting, over objection of appellant, the government to ask and receive answers to various leading questions covering important matters in issue in this case, all to be particularly specified in the Assignment of Errors to be filed hereafter.

(j) The Court erred in refusing to admit in evi-

dence various documentary evidence and exhibits offered by appellant. [173]

(k) The Court erred in rejecting various offers of proof made by appellant with respect to material issues in this case, including the offer to prove various facts concerning the voluntary testimonials received by defendant in relation to the money back guaranty under which these products were sold, all of said rulings to be particularly specified hereafter in the Assignment of Errors.

(l) The Court erred in refusing to permit defendant Colgrove to testify as to on what he based various assertions contained in the advertising matter and quoted in the information, and which the government claimed and alleged to be false, including the statement to the effect that various users of these products had credited these Colusa products with excellent results in the treatment of certain skin diseases, and also the statement that radium emanations have certain characteristics, as quoted in the newspaper mat referred to in said information.

(m) The Court erred in permitting the government to cross-examine defendant Colgrove as to certain matters not at all relevant to the issues in this case, and not at all pertinent to the matters covered on his direct examination, to-wit, the various businesses and activities in which this defendant had previously been engaged.

(n) The Court erred in permitting the government to cross-examine defendant Colgrove as to

certain letters received in evidence and marked as Government's Exhibit 13.

(20) The Court erred in giving certain instructions to the jury as requested by the plaintiff, and objected to by appellant, all to be particularly specified hereafter in the Assignment of Errors.

(21) The Court erred in refusing to give certain instructions to the jury requested by appellant.

Dated: July 7, 1942.

MORGAN J. DOYLE,
WILLIAM M. GLEASON
WILLIAM B. ACTON

Attorneys for Appellant.

(Admission of Service)

[Endorsed]: Filed Jul. 9, 1942. [174]

[Title of District Court and Cause.]

ORDER AUTHORIZING DEPOSIT OF FINE
IN ESCROW PENDING APPEAL

Whereas, on July 7, 1942, judgment was rendered in the above entitled cause, imposing certain fines on the defendants in said cause, and in the alternative, providing for certain jail sentences in the event said fines were not paid; and

Whereas, said defendants have filed their Notice of Appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from said judgment;

Now, Therefore, It Is Hereby Ordered that exe-

cution of the judgment of conviction and sentence against the defendants Empire Oil and Gas Corporation, a corporation, and Chester Walker Colgrove, trading as Colusa Products Company, and each of them, be and the same [175] is hereby stayed pending appeal and until the final determination of the appeals taken by said defendants and until the judgment and sentences have become final; such stay being granted on the terms and condition that there is required to be deposited with the Clerk of this Court in escrow for and in behalf of each of said appealing defendants the amount of the fine such defendant is sentenced to pay, such deposit in escrow to be made under and subject to the provisions of Rule V. of the Rules of Procedure in Criminal Cases, and the stay of execution to be immediately effective upon the making of such deposit.

Dated: July 9, 1942.

MICHAEL J. ROCHE,

Judge of the United States
District Court.

[Endorsed]: Filed Jul. 9, 1942. [176]

[Title of District Court and Cause.]

STIPULATION RE EXTENSION OF TIME
FOR FILING AND SETTLEMENT OF
BILL OF EXCEPTIONS, ETC.

It Is Hereby Stipulated by and between the
United States of America, plaintiff and appellee in

the above entitled cause, and the appellants therein, as follows:

First: That the time for the filing by the appellants of their proposed Bill of Exceptions and Assignment of Errors in said cause may be extended by the Court to and including the 30th day of September, 1942.

Second: That the plaintiff and appellee shall have to and including the 20th day of October, 1942 within which to file its proposed Amendments to said proposed Bill of Exceptions.

Third: That the time within which the Bill of Exceptions of the appellants in the above entitled action shall be settled may be extended by the Court to and including the 30th day of [177] October, 1942.

Fourth: That the parties hereto hereby consent to the making and entry, by the above entitled Court, of its Order in accordance with the provisions of this Stipulation.

Dated: September 10th, 1942.

FRANK J. HENNESSEY,

United States Attorney,

By A. J. ZIRPOLI,

Asst. United States Attorney.

MORGAN J. DOYLE,

WALTER M. GLEASON,

WILLIAM B. ACTON,

Attorneys for Appellants.

[Endorsed]: Filed Sep. 10, 1942. [178]

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH
TO SETTLE BILL OF EXCEPTIONS AND
FILE ASSIGNMENT OF ERRORS

Upon reading and filing the stipulation of the parties to the above entitled cause, it also otherwise appearing to the Court that there is good cause therefor,

It Is Hereby Ordered that the time within which the proposed Bill of Exceptions of the appellants in the above entitled cause shall be filed therein, be, and it is hereby extended to and including the 30th day of September, 1942.

It Is Further Ordered that the plaintiff and appellee in said cause shall have to and including the 20th day of October, 1942, within which to file its proposed Amendments, if any, to said Bill of Exceptions.

It Is Further Ordered that the time within which the Bill of Exceptions in said cause, on behalf of the appellants therein, [179] shall be settled is extended to and including the 30th day of October, 1942.

Dated: September 10, 1942.

A. F. ST. SURE,

Judge of the U. S. District
Court

[Endorsed]: Filed Sep. 10, 1942. [180]

[Title of District Court and Cause.]

STIPULATION EXTENDING TIME FOR FILING AND SETTLEMENT OF BILL OF EXCEPTIONS

It Is Hereby Stipulated by and between the United States of America, plaintiff and appellee in the above-entitled cause, and the appellants therein, as follows:

I.

That the plaintiff and appellee shall have to and including the 30th day of October, 1942, within which to file its proposed amendments to the proposed bill of exceptions heretofore filed by the appellants.

II.

That the time within which the bill of exceptions in the above-entitled action shall be settled may be extended [181] by the Court to and including the 15th day of November, 1942.

III.

That the parties hereto hereby consent to the making and entry by the above-entitled Court of its order in accordance with the provisions of this stipulation.

FRANK J. HENNESSY,
United States Attorney,
Attorney for Plaintiff and
Appellee

WALTER M. GLEASON,
MORGAN J. DOYLE,
WILLIAM B. ACTON,

Attorneys for Appellants.

[Endorsed]: Filed Oct. 20, 1942. [182]

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH
TO SETTLE BILL OF EXCEPTIONS AND
FILE ASSIGNMENT OF ERRORS

Upon reading and filing the stipulation of the parties to the above-entitled cause, it also otherwise appearing to the Court that there is good cause therefor,

It Is Hereby Ordered that the plaintiff and appellee in said cause shall have to and including the 30th day of October, 1942, within which to file its proposed Amendments, if any, to the proposed Bill of Exceptions of appellants.

It Is Further Ordered that the time within which the Bill of Exceptions in said cause, on behalf of the appellants therein, shall be settled is extended to and including the 15th day of November, 1942.

It Is Further Ordered that the term of this Court be, and the same is, extended to and including the 15th day of November, 1942, to enable the parties to this action to comply with this order within said time.

Dated: October 20th, 1942.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Oct. 20, 1942. [183]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Come now the defendants and appellants in the above entitled cause and make and file this their Assignment of Errors herein, upon which they will apply for a reversal of judgment and sentence heretofore made in said cause against them, and which errors, and each of them, are to the great detriment, injury, and prejudice of said defendants and appellants, and in violation of the rights conferred upon them by law; and said appellants say that in the record and proceedings in the above entitled cause, upon the hearing and determination thereof in the Southern Division of the United States District Court for the Northern District of California, there is manifest error, in this, to-wit:

I.

The Court erred in denying the motions of appellants for [184] a directed verdict of Not Guilty on Count One made by the defendants at the conclusion of the taking of evidence in this cause, which said ruling was duly excepted to by appellants. Said Court erred in this because the evidence was and is insufficient to sustain a verdict of guilty against said defendants, or either thereof, as to said count, and said verdict was and is against the law.

II.

The Court erred in denying the motions of appellants for a directed verdict of Not Guilty on Count Two made by the defendants at the conclu-

sion of the taking of evidence in this case, which said ruling was duly excepted to by appellants. Said Court erred in this because the evidence was and is insufficient to sustain a verdict of guilty against said defendants, or either thereof, as to said count, and said verdict was and is against the law.

III.

The Court erred in denying the motions of appellants for a directed verdict of Not Guilty on Count Three made by the defendants at the conclusion of the taking of evidence in this case, which said ruling was duly excepted to by appellants. Said Court erred in this because the evidence was and is insufficient to sustain a verdict of guilty against said defendants, or either thereof, as to said count, and said verdict was and is against the law.

IV.

The Court erred in denying appellants' motion in arrest of judgment because of the various jurisdictional defects and matters appearing of record, all as fully set forth in other portions of this Assignment of Errors, and in said motion, which ruling was duly excepted to by appellants. [185]

V.

The Court erred in denying appellants' motion for a new trial, which said ruling was duly excepted to by appellants. Said Court erred in this because of all of the aforesaid reasons, and further because of the errors of law at the trial of said cause, as particularly assigned and set forth hereinafter.

VI.

The Court erred in denying appellants' motion to compel the Government to elect as to which of the two separate alleged offenses set forth in Count Three it desired to submit to the jury; said Count contained two distinct charges and the Court should have compelled the Government to elect between these two. Said ruling was duly excepted to.

VII.

The Court erred in giving the following instruction to the jury, viz:

"The sole and remaining question for you to determine from the evidence in this case is whether or not the drugs covered by the three counts of the Information were misbranded as alleged by the Government. If you are satisfied from the evidence beyond a reasonable doubt that the articles of drug bore statements in their labeling or accompanying circulars or newspaper mat that were false or misleading in any particular in which they are alleged in the Information to be false or misleading, then the drugs in those counts wherein the labeling is so false or misleading in any particular is misbranded in the manner charged by the Government and your verdict shall be guilty as to those counts wherein such misbranding exists. If you find from the evidence that the statements in the labeling of the drugs covered by the respective counts of the Information support the therapeutic claims of the defendants and are true, then the drugs covered by

those counts wherein the statements on the labeling as to therapeutic claims [186] are true, are not misbranded, your verdict should be not guilty for all or any of those counts wherein you so find."

Said instruction is erroneous in that it is too broad. It in effect instructs the jury that if any false statement was contained on the label or the circulars or advertising material accompanying these products, that would be sufficient to justify a conviction of the defendants, whereas in truth and in fact the only alleged false statements which were in issue were and are those specifically set forth in the information, and which relate to certain phases of the therapeutic efficacy of said products. Said instruction was duly excepted to.

VIII.

The Court erred in giving the following instruction to the jury, viz:

"It is not necessary for the Government to prove that each and all of the statements of each count of the Information contained on the label or in the circulars or newspaper mat are false or misleading. If the Government has established by the degree of evidence which I have explained to you, that any one material statement or representation as to the therapeutic effect of the drug upon the label or circular or newspaper mat covered by any one count is false or misleading, then the article covered by that count is misbranded within the meaning of the Federal Food, Drug, and Cosmetic Act, and you should find the defendants guilty as to such counts

in which you find the article so misbranded. But if the Government has failed to establish to your satisfaction by that degree of proof and beyond a reasonable doubt any one of the charges of misbranding in any one or more of the counts, then you should acquit the defendants as to such counts.”

Said instruction is erroneous in that it is too broad. It in effect instructs the jury that if any false statement was contained on the label or the circulars or advertising material [187] accompanying these products, that would be sufficient to justify a conviction of the defendants, whereas in truth and in fact the only alleged false statements which were in issue were and are those specifically set forth in the information, and which relate to certain phases of the therapeutic efficacy of said products. Said instruction was duly excepted to.

IX.

The Court erred in giving the following instruction to the jury, viz:

“The Federal Food, Drug and Cosmetic Act does not make the intent with which an unlawful shipment is made, an ingredient in the offense. The intent of the defendants is immaterial.”

Said instruction is erroneous in that it conveyed the impression to the jury that even if the alleged acts or offenses with which defendants were charged in the information were due to inadvertence and through no willful intent or knowledge on the part of the defendants, the defendants would still be

guilty of a crime. Said instruction was duly excepted to.

X.

The Court erred in giving the following instruction to the jury, viz:

Therefore, if you find from the evidence beyond a reasonable doubt that the drugs involved in the three counts of the indictment, or any of them, were in fact misbranded in the manner alleged in the information or any count thereof, you shall find the defendants guilty as charged in those counts wherein you find the drugs were misbranded, regardless of the intent in the minds of the defendants.”

Said instruction is erroneous in that it conveyed the impression to the jury that even if the alleged acts or offenses with which defendants were charged in the information were due to inadvertence and through no willful intent or knowledge on the [188] part of the defendants, the defendants would still be guilty of a crime. Said instruction was duly excepted to.

XI.

The Court erred in giving the following instruction to the jury, viz:

“If, after hearing the evidence in this case, you reach the conclusion that the drugs or products involved here were harmless, that does not excuse the defendants, if you find that they placed statements upon said drugs which were false, concerning the curative and therapeutic effects of such products, as the danger and injury to the public from repre-

sentations of this type is in that it induces persons frequently to rely in serious cases upon preparations without healing virtue when, but for this reliance, they would secure proper advice and treatment for the ills which affect them."

Said instruction is erroneous in that it in effect instructs the jury that if any false statement was contained on the label or the circulars or advertising material accompanying these products, that would be sufficient to justify a conviction of the defendants, whereas in truth and in fact the only alleged false statements which were in issue were and are those specifically set forth in the information, and which relate to certain phases of the therapeutic efficacy of said products. Said instruction was duly excepted to.

XII.

The Court erred in refusing to give the following instruction submitted and requested by defendants, viz:

"To constitute a party guilty of crime, the evidence must show intentional participation in the attempt to violate the statutes in question."

Defendants duly excepted to said ruling. Said instruction was and is proper, and particularly related to the alleged [189] misbranding charged in Count Three. The evidence shows that the omission of certain matter from the labels on the hemorrhoid ointment was inadvertent and without the knowledge of the defendants.

XIII.

The Court erred in refusing to give the following instruction submitted and requested by defendants, viz:

“There must be an intentional participation in the transaction with a view to the common design and purpose, before a party can be guilty of crime.”

Defendants duly excepted to said ruling. Said instruction was and is proper, and particularly related to the alleged misbranding charged in Count Three. The evidence shows that the omission of certain matter from the labels on the hemorrhoid ointment was inadvertent and without the knowledge of the defendants.

XIV.

The Court erred in refusing to give the following instruction proposed and requested by defendant Colgrove, viz:

“In this case Mr. Colgrove is jointly charged with the defendant corporation in the information. However, you are instructed that it is the law that an officer of a corporation—and here Mr. Colgrove is President of the corporation—cannot be held liable unless he personally knowingly and actually participates in the commission of the acts alleges to be unlawful. An officer of a corporation is not criminally liable for the acts of the corporation performed by other officers or agents. Therefore, unless you find that Mr. Colgrove did know that the jars of ointment referred to in the Third Count of

the information had not been properly labeled, but that the jars of ointment with the incomplete label had been shipped by clerks and employees of the corporation without Mr. Colgrove's knowledge, then and in that [190] event you will find Mr. Colgrove personally not guilty."

Said ruling was duly excepted to.

Said defendant was simply a corporate officer and cannot be held responsible for corporate acts, except those in which he had a personal participation, and the jury should have been so instructed, particularly with respect to the charge in the Third Count which involved the omission from certain labels of certain quantitative data.

XV.

The Court erred in sustaining an objection of the Government to questions of defense counsel to the witness Dr. Von Hoover, which questions were designed to elicit the opinion of the witness as to the efficacy of Colusa Natural Oil in the treatment of certain skin diseases. This witness was, as shown in the record, a duly qualified pharmacologist whose business was that of testing preparations and drugs for their therapeutic efficacy; the evidence shows that he was thoroughly trained in his profession, holding degrees from leading universities, including the University of Vienna; that he had practiced this profession for a long period of time, and in this practice had represented, and now represents, leading drug firms of this country as a consultant

pharmacologist; that he and some professional associates operate a testing clinic at San Antonio, Texas, and that the function and business of this clinic is that of testing just such preparations as those involved in this case to determine their therapeutic value; that this witness and his said associates had conducted extensive clinical tests of Colusa Natural Oil; that in those tests, they actually tested the oil on many human beings suffering from the various ailments mentioned in the information in this case, including the disease of psoriasis, to determine whether or not this product is efficacious in the treatment of such ailments. After bringing out all of said facts aforementioned, the defendants [191] sought to elicit the opinion of this witness as to the efficacy of this product. The Government objected to such testimony on the ground that because the witness was not actually an M.D., he was not competent to give any such opinion. The Court agreed with counsel for the Government and sustained their objections to this line of examination. The record with respect to this in part is as follows:

“Mr. Gleason: Q. What is your opinion, Doctor, based upon the many tests made by you in your laboratory and in these clinics, and based upon your training as a pharmacologist, and based on your studies of the science of pharmacology, what is your opinion as to the efficacy of Colusa Oil in the treatment of psoriasis?

“Mr. Zirpoli: I want to interpose an objection, your Honor.

“The Court: Objection sustained. Proceed.

“Mr. Gleason: Note an exception, if your Honor please.

“The Court: Let an *objection* be noted.”

Said ruling was erroneous in that said evidence was and is clearly competent and material. This witness, a duly qualified specialist in this field of testing drugs had actually made detailed clinical tests to determine the efficacy of this product in the treatment of psoriasis, and the mere fact that he was not an M.D. certainly did not preclude him from testifying on this subject.

XVI.

The erroneous and prejudicial effect of the Court's rulings on this phase is further exemplified by the following portions of the record:

“Yes, I observed the use of Colusa Natural Oil on a man named Mercurlin, who met a premature death. He was a deputy sheriff.

“Q. What skin disease did he have Doctor? [192]

“Mr. Zirpoli: I object to that on the ground that this witness is not qualified to testify to that.

“The Court: Objection sustained.

“Mr. Gleason: Q. Do you know what disease he had?

“Mr. Zirpoli: The same objection.

“The Court: The same ruling.

“Mr. Gleason: Q. He had a skin disease, did he, doctor? A. He did.

“Q. On what part of his body?

"A. On the right arm.

"Mr. Zirpoli: I ask that the answer go out. He is not competent to testify.

"Mr. Doyle: We will take a ruling of the Court.

"The Court: Proceed."

"Q. After the oil was applied in the clinic, did you observe its effect upon the patient?

"A. Yes.

"Mr. Zirpoli: I object to his observation of the effect of a medication on a patient. He is not competent to testify to the effect of a medication on a patient.

"Mr. Acton: I don't like to argue after your Honor has ruled, but the law is, I think, your Honor, that a man may observe a person, and may know that person is undergoing a certain type of medication, because he is undergoing it right in his own home, or in his laboratory.

"Mr. Gleason: Q. Did you see the Colusa Natural Oil applied to people who had psoriasis in this clinic? A. Yes.

"Mr. Zirpoli: Just a moment, I object to that. He is not competent to testify they had psoriasis.

"The Court: Objection sustained.

"Mr. Zirpoli: There are methods of proving those things by bringing proper witnesses."

XVII

The Court erred in sustaining an objection of the Government [193] and striking certain testimony

of the witness Dr. Von Hoover with respect to a varicose ulcer case. This case had been treated with Colusa Natural Oil in this clinical testing of Dr. Von Hoover and his associates. This testimony was as follows:

"A. Mrs. A. Nelly is the varicose ulcer.

"The Court: How do you know?

"A. Well, from my experience, your Honor, in the laboratory, and as a doctor of science, and from the knowledge I have of *Materia Medica*, and dermatology and therapeutics, I determine that.

"The Court: By observation.

"A. By observation, yes sir.

"The Court: That is what you base your testimony on?

"A. That is what I base my testimony on, yes sir.

"The Court: All right, proceed.

"Mr. Gleason: May I have this picture marked next in order for identification?"

Thereupon the photograph was marked Defendants' Exhibit H for identification.

"Mr. Zirpoli: May I ask one other fundamental question?

"The Court: You may.

"Mr. Zirpoli: You are not a pathologist, are you?

"A. No sir, I am not a pathologist.

"Mr. Zirpoli: Now I object to his conclusion as to the woman having a varicose ulcer on that further ground.

“The Court: I will sustain the objection and instruct the jury to disregard the testimony.

“Mr. Gleason: May we have an exception?

“The Court: You may have an exception.”

For the same reasons as are set forth hereinabove in Paragraph XV with respect to other testimony of this same witness, said ruling of the Court was erroneous, and obviously prejudicial [194] to the defendants.

XVIII

The Court erred in sustaining an objection of the Government to certain testimony of the witness Dr. Von Hoover, with respect to the clinical tests made by him and his associates on animals to determine the efficacy of this Colusa Natural Oil, viz:

“Q. Please state briefly the facts observed by you in these clinical tests on this animal therapy as to the results of the use of Colusa Natural Oil on skin diseases of animals. And, Doctor, confine yourself to the facts that you know of your own knowledge and do not read any of the opinions if they are opinions of Dr. Burby.

“Mr. Zirpoli: I want to make this objection, your Honor. He is asked to testify as to the effect of the application of this oil, which calls for his opinion and conclusion as a veterinarian.

“The Court: Objection sustained.

“Mr. Acton: Will your Honor allow us an exception to that ruling?

“The Court: Note an exception.

“Mr. Gleason: Q. Doctor, in the practice of your profession as a pharmacologist and your work for these firms that you mentioned yesterday, including the Goodman Laboratories and the rest of them, as their consultant, do you in the practice of your profession resort to animal therapy to test the efficacy of drugs and preparations?”

“A. Yes.

“Q. Is that a part of the ordinary practice of the ordinary pharmacologist?”

“A. That is the practice.

“Q. I will ask you to state, Doctor, the facts that you observed, in your clinical examinations, that is to say, this animal therapy, from the use of Colusa Natural Oil upon the skin diseases of dogs and cats used in this animal therapy.

“Mr. Zirpoli: May it please the Court, I submit that the [195] question is identical in different terms and the objection is made exactly as it was made to the last question.

“The Court: The objection will be sustained.

“Mr. Acton: May we have an exception to the ruling?”

“The Court: Note an exception.

“Mr. Zirpoli: May I have the record also show that my objection is on the ground that it is irrelevant and immaterial to the case.

“The Court: Let the record so show.”

The evidence sought to be elicited by these questions was clearly relevant and material and the Government's objection that this witness was not

qualified to testify as to these facts because he was not a licensed veterinarian was without merit. This witness was a qualified pharmacologist and fully qualified to testify as to this animal therapy which, as the record shows, is an orthodox procedure in the testing of drugs and other such preparations for the treatment of disease.

XIX

The Court erred in sustaining an objection of the Government to certain questions propounded to the witness Dr. Von Hoover by the defense in their effort to bring out all the facts concerning the clinical testing at San Antonio by this witness and his associates of this Colusa Natural Oil. The witness had in his possession an original memorandum prepared by him and containing the facts observed by him in these tests, and he testified that this memorandum was made immediately upon the conclusion of these tests, and that the memorandum refreshed his recollection as to the facts observed by him in the use of this oil upon various persons having the diseases mentioned in the information in this case. The witness further testified:

“Q. What is it?

“A. It is a report of the clinical results of oil on the [196] physiological tests on human patients.

“Q. Those are the one hundred and some-odd patients you mentioned yesterday afternoon?

“A. This contains a hundred, this report.

“This report contains the essential facts which I observed in the making of these tests with Colusa Natural Oil on those one hundred patients.

“Q. Does this report, Doctor, contain a statement of the facts observed by you in these clinical tests made by you and your associates in your presence, on human beings, to ascertain the therapeutic value of Colusa Natural Oil in the treatment of psoriasis, athlete’s foot, impetigo, varicose ulcers and hemorrhoids? A. Yes.

“Q. And also acne? I omitted acne.

“A. No, I don’t believe we tested it on acne.

“Q. You are right, Doctor. You did test for poison oak and ivy. A. Yes.

“Q. Now then, will you, by reference to this report—

“Mr. Zirpoli: May I ask some foundational questions before I interpose any objections? This report also purports to be the reports of Dr. A. Berchelmann, M. D., clinician, is that correct?

“A. Yes.

“Q. And this report also purports to show the effects and results secured by the treatment of these human persons by the physician and surgeon, is that correct? A. Yes.

“Mr. Zirpoli: Then, your Honor, I submit that the witness is incompetent to testify as to the facts herein contained on the grounds that it is not exclusively the information of the witness, and on the further ground that it contains hearsay testimony predicated upon hearsay facts of a physi-

cian and surgeon, a person other than himself, and on the further ground that he is not competent as a physician and surgeon to testify as to the effect [197] and results.

"The Court: Same ruling. The objection will be sustained.

"Mr. Acton: May we be allowed an exception to the ruling?

"The Court: Note an exception."

Said ruling was erroneous and highly prejudicial to the defense. It was most important to the defendants that they be permitted to develop all the facts concerning this clinical testing done by Dr. Von Hoover and his associates. The witness made this memorandum when the facts were clear in his mind, and under settled law he had a right to refer to this original memorandum for the purpose of refreshing his recollection as to the exact facts concerning these very important tests.

XX

The Court erred in sustaining an objection of the Government to a certain question propounded to the witness Dr. Von Hoover by the defense, viz:

"Mr. Gleason: Q. And in the cases personally observed by you in these clinical tests, in any of these cases did you observe any unfavorable or injurious results from the use of Colusa Natural Oil on these patients?

"Mr. Zirpoli: Objected to as calling for an opinion and conclusion, your Honor, of this witness, who is not a physician and surgeon.

“Mr. Gleason: That is his business, if your Honor please, and profession; he tests drugs.

“The Court: The objection will be sustained.

“Mr. Acton: May we note an exception to that ruling?

“The Court: Note an exception.”

The fact as to whether or not any injurious or unfavorable results ensued from the use of this Colusa Oil in this clinical testing at San Antonio was, we respectfully submit, a clearly relevant and material fact bearing upon the worth and efficacy of [198] this product.

XXI

The Court erred in sustaining an objection of the Government to certain testimony of the defendant Colgrove. One of the charges in the Third Count in the information is that the defendants omitted to place on certain labels the designation of the quantity of the contents of the jars in question. The defense sought to show that this omission was entirely inadvertent and was caused by a mistake of the printing firm which printed these labels. The Court ruled that such testimony was irrelevant and immaterial, viz:

“Mr. Gleason: Did you eventually discover that such labels were being sent out?

“A. I did, and destroyed the rest of them; I destroyed the balance of those labels and ordered correct labels, a new printing of labels.

“Mr. Zirpoli: May I ask that that all be stricken out as irrelevant and immaterial?

"The Court: The objection will be sustained.

"Mr. Acton: May we note an exception?

"The Court: Note an exception.

"Mr. Gleason: Q. When you ordered the labels printed at the McCoy Label Company, did you in your order ask them to put on the label, the designation ' $\frac{3}{4}$ of an ounce'? A. I did.

"Mr. Zirpoli: Same objection, your Honor; irrelevant and immaterial as to what he did.

"The Court: Objection sustained."

It was here stipulated that if Miss Nelson, representative of the firm which printed the labels, were called, she would testify this was a mistake on the part of her printing firm; and that in the printing of the labels involved in the Third Count in this case, the designation " $\frac{3}{4}$ of an ounce" was inadvertently [199] omitted from the labels, and that Mr. Colgrove as manager of the defendant company had previously sent said printing firm a letter, marked here as Defendants' Exhibit P for identification, which was received by the McCoy Label Company; and that within a week of this time, Mr. Colgrove had the label company correct this inadvertence and put upon the label the designation " $\frac{3}{4}$ of an ounce." Will that be so stipulated?

"Mr. Zirpoli: Subject to the objections heretofore made that it is irrelevant and immaterial.

"The Court: Objection sustained.

"Mr. Gleason: An exception, if the Court please.

“The Court: Very well.”

Mr. Gleason, at this time, to complete that record, offered in evidence Defendants’ Exhibit P for identification, which is the letter Mr. Colgrove previously referred to.

“Mr. Zirpoli: We make the same objection. It was offered once before, and I object again that it is irrelevant and immaterial.

“The Court: Objection sustained.

“Mr. Doyle: May we have an exception?

“The Court: Exception.”

Said testimony was relevant and material because it showed that the alleged omission from the label was entirely inadvertent and without the knowledge of the defendants.

XXII

The Court erred in sustaining an objection of the Government to certain proposed testimony of the defendant Colgrove. The information charges that certain statements made in the advertising matter issued in connection with this Colusa Natural Oil were false. Among these statements quoted in the information is the statement substantially to the effect that various users of this product have credited it with effective results, etc. In an [200] effort to explain the basis of this particular statement, and to demonstrate the truth thereof, the defense sought to show that the defendants based it in part upon hundreds of voluntary testimonials received from persons who had used this oil in the

treatment of the diseases mentioned in the information, viz:

“Mr. Gleason: Q. In the information, Mr. Colgrove, there is a statement set forth, ‘Colusa Natural Oil is credited by other users with producing relatively as remarkable results as above pictured in relieving irritation of external acne, eczema, psoriasis, athlete’s foot or ringworm, poison ivy, varicose ulcers, burns and cuts.’ You have been marketing this oil for approximately two or three years, as I recall your testimony. Upon what did you base this statement that is contained in this information, the statement just read?

“Mr. Zirpoli: I object, your Honor; it is irrelevant and immaterial as to what he based it on; all that matters is the fact that the statement is there and the statement speaks for itself.

“Mr. Gleason: In this information are various statements quoted from the advertising matter. Counsel has submitted to your Honor instructions that we desire to argue to the effect that if any false statement is contained in any portion of the advertising matter, the mats or otherwise, that this man can be convicted. We desire to show the truth of this statement. We desire to show that when Mr. Colgrove said that ‘Colusa Natural Oil is credited by other users’ he was telling the truth, and we desire to submit to your honor hundreds of testimonials in regard to this product received from users by the defense.

“The Court: Testimonials cannot go into evidence here.

“Mr. Gleason: I don’t want you to think I am going contrary to your ruling. I make the statement, I make it as an officer of this court, that I believe under this information, [201] under settled principles of law——

“The Court: You may believe whatever you see fit.

“Mr. Gleason: May I present the law to your Honor on that subject?

“The Court: No, we will proceed. You make your offer of proof and you have a record to protect you, and I will rule.”

“Mr. Gleason: Then we will make the offer of proof and that will conclude this subject. We offer to prove the following facts by this witness at this time:

“First, that from persons to whom this preparation was distributed by these defendants throughout the United States, hundreds of testimonials, the originals of which are here available for inspection, and we have gone to the trouble of copying them—hundreds of testimonials, voluntary testimonials, have been received by this company and by this defendant.

“We further offer to prove that this product was marketed and distributed to these thousands of persons under a money-back guarantee if not satisfied, and that out of the thousands of people to whom that guarantee was made, approximately two per cent availed themselves of the guarantee.

“We further offer to prove, if the Court please, the truth of the statement contained in this information. We offer these testimonials, and these testimonials will prove the truth of the statement that ‘Colusa Natural Oil is credited by other users with producing relatively as remarkable results as above pictured in relieving irritation of external acne, eczema, psoriasis, athlete’s foot or ringworm, poison ivy, varicose ulcers, burns and cuts,’—the statement contained at lines 13 to 16 on page 3 of this information and reincorporated by reference in later portions of the information. And we offer those facts, if the Court please, as being relevant, pertinent and competent in the proof of the issues involved in this case. [202]

“Mr. Zirpoli: If I might respectfully submit, your Honor, as I have heretofore had occasion to state in arguing various points before the Court, that there was no element of fraud or bad faith involved; it is a simple case of misbranding, and that therefore testimonials are not admissible in evidence. Had this been a fraud case, then the position taken by counsel would have been a proper one, but this is a misbranding case and not a case predicated upon fraud or fraudulent intent.

“The Court: The objection will be sustained.

“Mr. Doyle: Exception if your Honor please.

“The Court: Certainly.

“Mr. Gleason: At this time, if the Court please, simply to complete the record, we desire to have

the original testimonials marked for identification.

“Q. To get a preliminary foundation, you have handed me, Mr. Colgrove, a file containing various papers. Did you prepare that file?

“A. No, sir; those letters were written by individuals.

“Q. I mean, did you put these into the file?

“A. Yes, sir.

“Q. What are they?

“A. Voluntary testimonial letters received from purchasers of Colusa Natural Oil products.

“Q. And you personally know that these are voluntary testimonials sent into the office?

“A. Yes, sir.”

Thereupon, Mr. Gleason offered these original testimonials in evidence.

“Mr. Zirpoli: Same objection; irrelevant and immaterial.

“The Court: Same ruling.

“Mr. Gleason: May they be marked, then, for identification?

“The Court: Let them be marked for identification.” [203]

The proffered testimonials were then marked Defendants' Exhibit Q-1 for identification.

“Mr. Doyle: May we have an exception to the last ruling, your Honor?

“Mr. Gleason: Q. You heard me read, Mr. Colgrove, a statement from the information in this case with respect to other users crediting various

and sundry things, a statement contained in some of the advertising matter. Upon what did you base that statement?

“Mr. Zirpoli: Same objection; irrelevant, incompetent and immaterial.

“The Court: Objection sustained.

“Mr. Doyle: I desire an exception, if the Court please.”

Said ruling was erroneous because the aforementioned testimonials were admissible and competent and relevant, if for no other purpose than that of explaining the basis for said assertion in the advertising matter, which assertion the Government alleged to be false. The testimonials were also admissible and competent on the issue as to the good faith of the defendants.

XXIII.

The Court erred in sustaining an objection of the Government to certain proposed testimony of the defense, viz:

“Mr. Gleason: Q. Mr. Colgrove, in the course of your marketing of this product, can you tell us the number of sales that have been made of this product to people throughout the United States?

“A. Many thousands of them.

“Q. You sold your product on a money-back guarantee, did you not? A. Yes.

“Q. Can you tell us how many of the people to whom you sold this product throughout the United States availed themselves of the opportunity to receive their money back? [204]

“Mr. Zirpoli: I object to that as irrelevant and immaterial, and a form of negative proof. I object to it.

“The Court: The objection will be sustained. We are not here concerned with any money-back guarantee. There is no issue involved in this case about money or money back for any sales. Let us proceed.

“Mr. Acton: Will your Honor allow us an exception to the last ruling?

“The Court: Certainly.”

The facts which the defense sought to elicit by said question aforementioned were competent, relevant and material because the issues in this case involve several things. In the first place, the good faith of the defendants was in issue, this being a criminal case; in the second place, the efficacy of this product was in issue. The facts sought to be elicited by the aforementioned question would have borne directly upon and would have been relevant to both of these issues.

XXIV.

The Court erred in sustaining an objection of the Government to a question asked of the witness Colgrove with respect to the source of certain statements inserted in the advertising matter with respect to the efficacy of radium and radium emanations. The Government claimed that these statements were false, and the defense sought to show that the statements were in fact based upon works and treatises of eminent specialists in the field of radium, viz:

“Mr. Gleason: Do you have available, Mr. Colgrove, the statement upon the basis of which these statements were incorporated in the newspaper mat with respect to the efficacy of radium through the body? Can you give counsel the authorities from which that was procured? A. Yes, sir.

“Mr. Zirpoli: I object to that. Authorities as given by [205] this witness are irrelevant and immaterial.

“Mr. Doyle: May he answer the question, if your Honor please?

“The Court: What question?

“Mr. Doyle: The question as to the source from which he obtained this statement which appears quoted in the mat. It appears as quoted.

“The Court: It matters very little the source of the information or where it came from. We are not concerned with the source of it.

“Mr. Doyle: Exception, if your Honor please.”

Defendants had a right to explain the source of any and all statements in the advertising matter which the Government claimed to be false, and the ruling of the Court in this instance was particularly prejudicial because the advertising matter specifically stated that eminent scientists had made the assertions in question about the power of radium. Under these circumstances it was no more than fair and just that the defendants be permitted to give the source and basis of this statement which the Government attacked as false.

XXV.

The Court erred in permitting the Government to pursue a long line of cross examination of the defendant Colgrove with respect to his various other business activities, none of which said facts had any relevancy or materiality in the case at bar. The Court permitted this examination over repeated objection of the defense and exceptions were duly taken to such ruling. The following illustrates this line of examination, viz:

“Q. In 1930, did you continue the operation of the insurance business in the State of Illinois?”

“Mr. Gleason: We object to that on the ground that it is incompetent, irrelevant and immaterial, and has nothing to do with [206] the issues in this case.

“The Court: Objection overruled.

“Mr. Gleason: May we have an exception?”

“The Court: Note an exception.

“A. Yes, sir.”

It was here stipulated that defendants' objections would run to this line of questioning with exceptions reserved.

Said ruling of the Court was erroneous and said line of examination was not proper cross examination.

XXVI.

The Court erred in permitting the Government to cross examine the defendant Colgrove at length with respect to a certain letter of a Dr. Woodman. Said examination was wholly incompetent, irrele-

vant and immaterial and was not proper cross examination, viz:

“Mr. Gleason: Just a moment, Mr. Colgrove. We object to this on the ground that it is incompetent, irrelevant and immaterial, if the Court please, not proper cross examination, has no bearing upon the issues in this case.

“Mr. Zirpoli: I would like to submit I am entitled to test the credibility of the witness, your Honor.

“Mr. Gleason: It has nothing to do with the credibility of the witness.

“Mr. Zirpoli: Yes it has.

“The Court: When was this?

“Mr. Zirpoli: The witness took the stand.

“The Court: In 1939?

“Mr. Gleason: This is a letter, if the Court please, dated October 28, 1940. So the Court will know——

“The Court: I will allow it. Objection overruled.”

“The letter you show me is a copy of a letter written me by Dr. Woodman, but the original letter did not have ‘M. D.’ after [207] his signature; my stenographer must have added the ‘M.D.’ by mistake. When I submitted the letter it evidently had ‘M.D.’ on it; I know Dr. Woodman for six months and saw him the day of the hearing; the photostat you show me is a copy of the letter Dr. Woodman gave me and ‘M.D.’ does not appear on it.

“Mr. Gleason: We object to that on the ground that it is utterly incompetent, irrelevant and immaterial. What bearing has that on this case?”

“The Court: That is a matter entirely for the jury. Let the jury determine.

“Mr. Gleason: He testified that his secretary made a mistake.

“Mr. Zirpoli: I will ask that these two exhibits be marked next in order in evidence as one exhibit.

“Mr. Gleason: May we have an exception?”

The documents were admitted and marked Government's Exhibit No. 13.

“Mr. Gleason: May we have an exception, if the Court please?”

“The Court: Note an exception.”

XXVII.

The Court erred in sustaining an objection of the Government to a question propounded by defense counsel to the defendant Colgrove. The defense sought to bring out, in order to show the good faith of the defendants in the marketing of the products involved in this case, that their practice was to give this oil free of charge to persons needing it, if such persons could not pay for it, viz:

“Mr. Gleason: Has it been your practice, Mr. Colgrove, in the distribution of this oil, to give it free of charge to hospitals, doctors, and whoever wanted it for use if they could not pay for it? [208]

“Mr. Zirpoli: I object to this, your Honor, as a pure and simple sympathetic appeal.

“Mr. Gleason: It certainly shows good faith, if the Court please.

“Mr. Zirpoli: I submit that good faith is not in issue.

“The Court: The objection will be sustained. Let it go out and let the jury disregard it.

“Mr. Acton: May we also have an exception, your Honor?

“The Court: Note an exception.”

The facts sought to be elicited by this question directly bore upon the good faith of these defendants whom the Government had charged with criminal practices.

XXVIII.

The Court erred in overruling an objection of the defense to a question propounded to Dr. Tainter, a witness for the Government, viz:

“Mr. Zirpoli: Q. Doctor, from your examination of this product, was it any different, from your own experience, from ordinary crude petroleum oil?

“Mr. Gleason: Just a moment. If the Court please, we object to that on the ground that it is incompetent, irrelevant and immaterial; that no proper foundation has been laid. And we stress this objection, if the Court please, for the reason, as has already been brought out, there are thousands of different types of crude oils with thousands of different constituents, and for a blanket assertion to be made of this type is utterly unfair. If the Court please, we submit this: if the doctor

wants to testify as to the crude oils that he has had experience with, he should give us the formulas and the designations, paraffine, asphalt or otherwise, and then compare this oil with them. Then we have some facts.

“The Court: The Court is prepared to rule. If the witness knows he may answer. The objection may be overruled. [209]

“Mr. Acton: Will your Honor allow us an exception before the answer?

“The Court: Note an exception.

“A. Well, because there are many varieties of oils, the material was different, of course, from a considerable number of them. However, it had no distinctive properties in the sense that it smelled like ichthyol or materials which you would recognize as having medicinal power, so that as far as I could make out, it was the commonest kind of crude oil in the sense that it had no special properties that were distinctive or characteristic.”

Said ruling of the Court was erroneous because, as the record shows, there are a great many varieties of crude oils having many different characteristics. The Government sought in this case to impress the minds of the jury their claim that this was an ordinary crude oil. The question above quoted was designed to carry out this purpose and was prejudicial to the defendants for the reasons stated in the argument above quoted in connection with this question. Said question was wholly incompetent, irrelevant and immaterial.

XXIX.

The Court erred in overruling an objection of the defense to a question propounded to the witness Dr. Tainter by the Government concerning the medicinal value of a wristwatch, viz:

“Mr. Zirpoli: Q. Is there any medicinal value in wearing a wristwatch with a luminous dial, in your opinion as a medical man and pharmacologist, as a man who applies medicines and oils to the skin and to the person?

“Mr. Gleason: We object to that, if the Court please, on the ground that it is incompetent, irrelevant and immaterial, no proper foundation laid.

“The Court: I have allowed wide latitude on this testimony. He may answer. Objection overruled. [210]

“Mr. Doyle: Exception.

“A. No. Wearing a wristwatch which has a luminous dial does not give rise to enough radium emanations to have any therapeutic value.”

Said question was incompetent, irrelevant and immaterial, and not within the issues in this case.

XXX

The Court erred in overruling an objection of the defense to a question propounded to the witness Dr. Tainter by the Government, viz:

“The salve or ointment would not be a competent or good treatment for hemorrhoids. It might be palliative in relieving itching; it might help the itching temporarily, but would not cure the condition. The benzocaine would relieve the itching.

“Mr. Zirpoli: Q. In this product we have .91 per cent of benzocaine, less than one per cent. Is there enough benzocaine there to be efficacious in the treatment of hemorrhoids, in your opinion?

“Mr. Doyle: If your Honor, please, we object to the question upon the ground that it has been asked and answered. The previous answers given by this witness were upon the basis of this formula given to him by counsel. He has testified that he thought it would be beneficial and this is obviously an attempt, conscious or unconscious, to impeach his own witness.

“The Court: Objection overruled. He may answer.

“Mr. Acton: May we note an exception before the witness answers?

“The Court: Note an exception.”

The question was obviously an attempt to have the witness change his testimony with respect to the efficacy of this hemorrhoid ointment in relieving the itching incident to hemorrhoids. As stated in the objection, it was in effect an attempt by the [211] Government to impeach this witness.

XXXI

The Court erred in overruling an objection of the defense to a question propounded to the witness Dr. Tainter by the Government, viz:

“Mr. Zirpoli: What is the effect of the application of oil such as the oil here on the skin?

“Mr. Gleason: We object, if the Court please,

that no foundation has been laid. We would like to have the doctor state whether or not he ever applied the oil to such a condition. Have you ever applied that oil to a condition of poison oak?

“Mr. Zirpoli: I can cite innumerable cases under the Federal Food and Drug Act, your Honor, which provide that when a man who is a scientist particularly learned in a particular field takes the stand, he is competent to testify about those matters for which he is specifically trained by reason of his learning and his instruction and his scientific training; and furthermore, there are innumerable cases that say that the particular doctor need not even have applied the particular product involved or have used or seen it if he knows its constituent, component parts and has been given the necessary foundation therefor. And that has been done, because we have told the doctor what this stuff consists of, and the doctor himself has seen it, and from his scientific medical knowledge he can give his opinion as to what the effect would be.

“Mr. Gleason: If the Court please, we doubt very seriously whether counsel can produce any case covering testimony of this type. We would like to ask one question, if we may, for foundational purposes, and that question will be whether or not the doctor has ever applied oil of this type to that kind of a disease.

“The Court: The Court is prepared to rule.

“Mr. Zirpoli: That is cross examination. [212]

“The Court: The Court is prepared to rule. You

may develop that on cross examination. The objection will be overruled.

“Mr. Acton: Will your Honor allow us an exception?”

“The Court: Yes.”

The Government had not laid any foundation to show that the witness had applied this particular oil to the skin, and in view of the complex nature of the oils, to permit the witness to testify as to the effect of Colusa Natural Oil on the skin without ever having subjected it to proper tests was incompetent, irrelevant and immaterial.

XXXII

The Court erred in sustaining an objection of the Government to a question propounded by the defense to their witness Howard Everett. The defense sought to elicit testimony of this witness as to the effects observed by him in the use of Colusa Oil by another person. The Court precluded such testimony by its ruling, viz:

“Mr. Gleason: Did you ever have any occasion, Mr. Everett, to observe personally the effect of Colusa Capsules—the use of Colusa Capsules—on any other person?”

“Mr. Zirpoli: I want to interpose an objection, your Honor. While I recognize that it is proper for counsel to bring a witness into the courtroom who himself used it and can testify as to what this effect has been with relation to his personal use, he cannot call a lay witness to testify as to the effect

of the use of a product of this nature on another person, particularly since he is not qualified. He cannot tell us, nor is he qualified to tell us, of the condition that the particular person may have been suffering from; nor is he qualified to tell us of the results or the beneficial effects.

"The Court: Just a moment. Be seated, gentlemen. The [213] Court is prepared to rule. Read the question, Mr. Reporter."

(Question read.)

"The Court: The objection will be sustained.

"Mr. Acton: Will your Honor allow us an exception to the last ruling?

"The Court: Certainly."

The following illustrates how unfairly the testimony was restricted in this connection, viz:

"Q. Will you describe the physical condition of the man prior to his use of the oil?

"Mr. Zirpoli: What do you mean by 'physical condition'? His appearance as the witness actually saw it?

"Mr. Gleason: That is what we are limited to under your objection.

"A. Why, he was ill.

"Mr. Zirpoli: Your Honor, that very statement is a conclusion; that he was ill calls for a conclusion; that is not a physical description. I ask that that be stricken from the record.

"The Court: It may go out.

"The Witness: He was thin, depressed.

"Mr. Zirpoli: I ask that the conclusion that he

was depressed go out; that obviously is not a conclusion that a person can make.

“The Court: It may go out.”

XXXIII

The Court erred in sustaining an objection of the Government to a question propounded by the defense to their witness Arthur W. Scott. This witness was a welder who had suffered many burns in the course of years following that work. He testified that he used Colusa Natural Oil on certain of these burns and that it gave great and instantaneous relief. He also testified he had used the well known product Unguentine for such burns, and in [214] order to bring out the merit of Colusa Natural Oil, the following question was propounded, viz:

“Mr. Gleason: Q. State, then if you will, briefly, whether the use of Colusa Natural Oil gave you the same or better relief than the Unguentine had previously given you.

“Mr. Zirpoli: I make the same objection. We don’t know anything about Unguentine.

“The Court: Is that all from this witness?

“Mr. Doyle: He hasn’t answered the question.

“The Court: The objection will be sustained.

“Mr. Doyle: Exception.”

XXXIV

The Court erred in sustaining an objection of the Government to a question propounded by the defense to their witness Scott with respect to the following matters. This witness had previously worked

for the defendants in the production of this Colusa Oil at the wells in Colusa County. In the advertising matter attacked by the Government as false, is the statement to the effect that the oil was worth \$10,000 a barrel. In order to demonstrate the correctness of this statement, the defense sought to show by this witness that in order to get one gallon of this valuable medicinal oil, it was necessary to pump from these wells many thousands of barrels of water, and that therefore the production process was so costly as to make a barrel of this medicinal oil worth approximately \$10,000 a barrel, viz:

“Mr. Gleason: Q. You operated these wells in Colusa County for the production of what we term ordinary crude oil. How many barrels of water are pumped in the pumping of these wells, or how many gallons of water in order to get one gallon of this medicinal oil?

“Mr. Zirpoli: We object to that as irrelevant and immaterial as to the process of how this is manufactured. [215]

“The Court: Objection sustained.

“Mr. Gleason: The only purpose, if the Court please, is, if I might just state it: there has been put in evidence a mat with the statement on it, ‘Oil worth \$10,000 a barrel’. If counsel is going to direct any attention to that, we want to show, if the Court please, that this barrel of Colusa Oil does cost \$10,000; that it requires the production of thousands upon thousands of barrels of water.

“The Court: Is that all?”

The evidence sought to be elicited was relevant and material as bearing upon the truth of the aforementioned statement inserted in said advertising matter and attacked by the Government.

XXXV

The Court erred in overruling an objection of the defense to the introduction by the Government of a certain formula from the United States Pharmacopoeia, viz:

“Mr. Zirpoli: At this time, if the Court please, I wish to introduce in evidence the formula from Government’s Exhibit 14 for identification, which is the United States Pharmacopoeia, which was identified by Dr. Von Hoover.

“Mr. Gleason: I want to interpose an objection. We object to the introduction of this book or any portion of it upon the ground that it is utterly incompetent, irrelevant and immaterial.

“The Court: For the purpose of the record, what is the purpose of this offer?

“Mr. Zirpoli: The purpose of this offer is this: when Dr. Von Hoover was on the stand, I asked him about the Pharmacopoeia of the United States and the Homeopathic Pharmacopoeia, and he stated there were both, and that this was the Allopath. I asked him if he could give me the *the* formula for sulphur ointment, and he told me that the general formula contained five per cent [216] sulphur; I want to show what the formula is in that Pharmacopoeia, which was his Bible.

“The Court: For that limited purpose I will allow it.

“Mr. Acton: May we have an exception?

“The Court: Note an exception.”

Said proffered evidence was wholly incompetent, irrelevant and immaterial, and did not constitute proper cross examination. It should be noted in connection with this phase, that this same witness who was denied the opportunity by the Court to express his opinions as to the efficacy of these products in the treatment of the various diseases mentioned in the information.

Wherefore, the defendants and appellants pray that by reason of the errors aforesaid, the judgment and sentence imposed upon them in this cause be reversed and held for naught.

Dated: Setpember 28, 1942.

Respectfully submitted,

MORGAN J. DOYLE

WILLIAM B. ACTON

WALTER M. GLEASON

Attorneys for Defendants
and Appellants.

Service and receipt of copy of the foregoing “Assignment of Errors” this 28th day of September, 1942 is hereby acknowledged.

FRANK J. HENNESSY,

U. S. Attorney

By A. J. ZIRPOLI

Attorneys for Plaintiff [217]

[Title of District Court and Cause.]

STIPULATION RE EXHIBITS

It Is Hereby Stipulated between the parties to the above entitled cause that none of the exhibits offered or received in said cause need be incorporated as a part of the record on appeal except the following, and that the originals of the following exhibits may be deemed to be a part of the Bill of Exceptions in this cause and may be separately transmitted and certified by the Clerk of the above entitled Court to the United States Circuit Court of Appeals, Ninth Circuit, and need not be physically incorporated in the Bill of Exceptions, viz:

Plaintiff's Exhibits Nos. 7, 8, 13, 4, 5, 6, and 14.

Defendants' Exhibits Nos. A, B, D, E, F, G, H, I, J, K, L, M, N, O, P, Q-1. [218]

Dated: September 28th, 1942.

FRANK J. HENNESSY,

U. S. Attorney

By A. J. ZIRPOLI

Attorney for Plaintiff

MORGAN J. DOYLE

WILLIAM B. ACTON

WALTER M. GLEASON

Attorneys for Defendants

It Is So Ordered.

MICHAEL J. ROCHE

Judge of the U. S. District Court

[Endorsed]: Filed Nov. 12, 1942. [219]

above named;

4. The judgment and sentence of the Court as to each of said defendants, and the verdict as to each of said defendants;

5. Motions of said defendants for a new trial, and orders denying the same; [220]

6. Motions of said defendants in arrest of judgment, and orders denying the same;

7. Stipulations and orders for extension of time for the filing and settlement of the Bill of Exceptions and filing of Assignment of Errors;

8. Stipulation and order for certification of original exhibits to the United States Circuit Court of Appeals and omission of certain exhibits from the record;

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of Said Court:

Please issue a transcript of the record to the Circuit Court of Appeals for the Ninth Circuit, in the above entitled cause, in connection with the appeals of the defendants Empire Oil and Gas Corporation, a corporation, and Chester Walker Colgrove, and include therein the following papers and orders, with all filing and other endorsements thereon, to-wit:

1. Indictment;
2. Statement of Docket Entries;
3. Arraignment and pleas of said defendants

9. Bill of Exceptions with stipulation of the parties, and order of Court settling said Bill;

10. Assignment of Errors;

11. Notices of Appeal by the defendants Empire Oil and Gas Corporation, a corporation, and Chester Walker Colgrove;

12. Order for deposit of fines in escrow pending appeal;

13. This Praecipe.

In preparing the foregoing record, please eliminate the title of the court and cause.

Dated: November 14th, 1942.

WALTER M. GLEASON

MORGAN J. DOYLE

WILLIAM B. ACTON

Attorneys for Defendants

Service and receipt of copy of the within Praecipe this 16th day of November, 1942 is hereby acknowledged.

FRANK J. HENNESSY

United States Attorney

By A. J. ZIRPOLI

Attorneys for Plaintiff

[Endorsed]: Filed Nov. 16, 1942. [221]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 221 pages, numbered from 1 to 221, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of United States of America vs. Empire Oil and Gas Corporation, a corporation, and Chester Walker Colgrove, trading as Colusa Products Company, No. 27554-R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Seven and 05/100 (\$7.05) Dollars and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 9th day of December, A. D. 1942.

[Seal]

WALTER B. MALING,
Clerk

By E. VAN BUREN
Deputy Clerk [222]

[Endorsed]: No. 10189. United States Circuit Court of Appeals for the Ninth Circuit. Empire Oil and Gas Corporation, a corporation, and Chester Walker Colgrove, trading as Colusa Products Company, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

Filed December 14, 1942.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 10189

EMPIRE OIL AND GAS CORPORATION, a
corporation, and CHESTER WALKER COL-
GROVE, trading as Colusa Products Com-
pany,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

INSTRUCTIONS TO CLERK UNDER
RULE 19, PARAGRAPH 6

To Paul P. O'Brien, Esq., Clerk of the United
States Circuit Court of Appeals:

1. Pursuant to Rule 19, Paragraph 6, Appellants
hereby request you to print the entire Transcript of
Record as their record on appeal.

2. Appellants hereby refer to their Assignments
of Error on file herein as the points on which they
rely on the appeal, and by reference to said As-
signments of Error hereby incorporate the same as
though set forth in haec verba at this place.

Dated: December 29th, 1942.

WALTER M. GLEASON

MORGAN J. DOYLE

WILLIAM S. ACTON

Attorneys for Appellants

[Endorsed]: Filed Dec. 29, 1942. Paul P. O'Brien,
Clerk.

No. 10,189

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMPIRE OIL AND GAS CORPORATION (a corporation), and CHESTER WALKER COLGROVE, trading as Colusa Products Company,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

WALTER M. GLEASON,

Shell Building, San Francisco,

WILLIAM B. ACTON,

Kohl Building, San Francisco,

Attorneys for Appellants.

FILED

APR 1 - 1943

PAUL P. O'BRIEN,
CLERK

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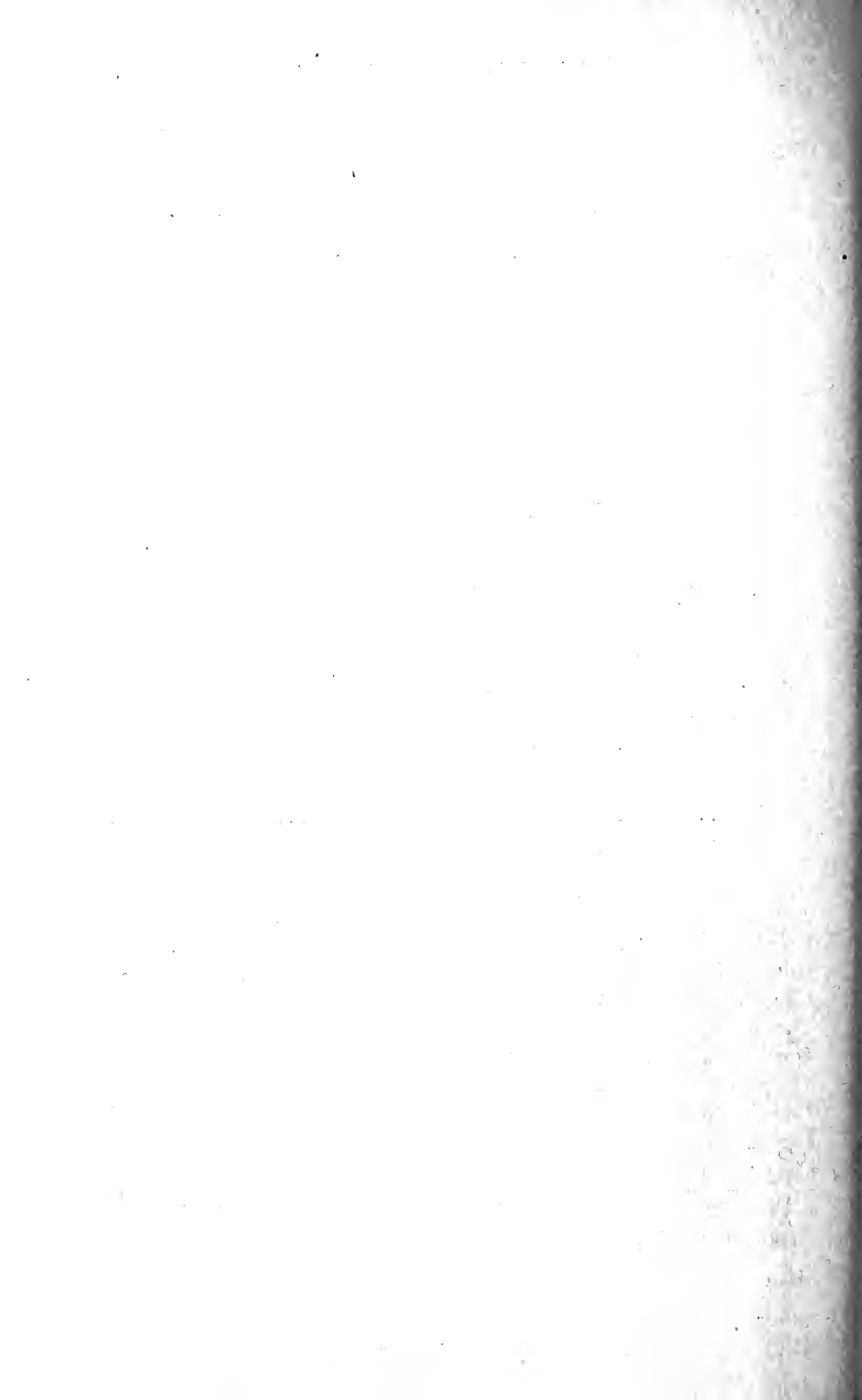
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No. 10,189

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

EMPIRE OIL AND GAS CORPORATION (a corporation), and CHESTER WALKER COLGROVE, trading as Colusa Products Company,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

JURISDICTION OF THE COURT.

This is an appeal from a judgment of the District Court of the United States, Northern District of California, Southern Division, convicting appellants under an information charging them with three counts of misbranding certain products distributed by them for use in the treatment of skin diseases. This information charges violations of the Act of Congress of June 25, 1938, known as the Federal Food, Drug and Cosmetic Act. (52 Statutes at Large, 1040; 21 U. S. C. 331.) After pleas of not guilty, a jury trial was had, and both appellants were convicted on all three counts of said information.

STATEMENT OF CASE.

Foreword.

The startling thing about this case is that although the only true issue was whether or not appellants' drugs were efficacious in the treatment of psoriasis and certain other skin diseases named in the information, the *entire* case in chief of the Government consisted of testimony by certain so-called expert witnesses, *not one of whom had ever so much as used or tested these products in the treatment of any of said skin diseases*. In fact, of the *ten* "experts" whose testimony comprised the *entire* Government case in chief, only *two* were skin disease specialists. Furthermore, neither of these two gentlemen *had ever seen appellants' products* let alone tested them! Incidentally, one of these specialists had just made a complete failure of his efforts to treat a severe case of psoriasis of a patient named Mrs. Mead. This lady, as a witness for the defense, testified as to the remarkable results accomplished by appellants' products in quickly clearing up her horrible skin disease, after her years of unsuccessful attempts to secure relief by treating with various skin specialists.

In short, appellants are in effect branded as criminals as a result of the testimony of these men *who had never even used or tested these products* in the treatment of such skin diseases, notwithstanding that the record in this case plainly shows, *without contradiction*, that not only are these products of appellants absolutely harmless and non-toxic, but also that they have accomplished great good in the treatment of psoriasis and these other skin diseases, for most of which afflictions the medical profession admits that it has no effective remedy.

Equally startling were the rulings and the attitude of the trial court with respect to Dr. Von Hoover, a vital defense witness. This highly trained scientist, a nationally known pharmacologist, whose very profession and business is that of testing the efficacy of drugs, and whose clientele includes many nationally known pharmaceutical

houses, conducted a long series of clinical and laboratory tests to determine the efficacy of appellants' products *in the treatment of the very skin diseases involved in this case*. These tests included *the actual clinical use of these products in many cases of these very skin diseases*. The defense brought this witness from his laboratory at San Antonio, Texas, to testify as to these careful and scientific tests, and the results thereof. Surprisingly enough, however, the trial court prevented the defense from using such evidence. While, on the one hand, it permitted the Government's experts free rein in voicing their opinions (which, under the circumstances, were nothing more than "guesses") as to the lack of efficacy of appellants' products, *on the other hand, it prevented Dr. Von Hoover from giving to the jury the benefit of this lengthy and scientific testing and investigation of these products on the very skin diseases involved in this case*. The court based its various and erroneous rulings, with respect to Dr. Von Hoover, on the utterly unsound premise that he was not competent to testify *because he was not a physician and surgeon*.

The defense also produced many "user" witnesses, laymen from various walks of life, who testified as to the great good accomplished by appellants' products in the treatment of their own horrible cases of psoriasis and the other miserable skin diseases involved in this case. The testimony of these disinterested witnesses clearly and indisputably shows that severe and long standing cases of such skin afflictions (cases which had baffled many eminent skin specialists and such noted institutions as Mayo Brothers, Battle Creek Sanatorium, Queens General Hospital, University of California Clinic, and others) were cleared up in the space of a few months by the use of appellants' products. *Not one line of this testimony was refuted or contradicted. It stands wholly unimpeached.*

The defense also produced practicing physicians who had successfully used appellants' products in the treat-

ment of these skin afflictions. These trained medical men were emphatic in their praise of these products, and they related in detail the many skin cases in which they had successfully used these products, and described in much detail the actual beneficial results and effects which they observed in treating these difficult cases with appellants' products.

Notwithstanding this state of the evidence, and in spite of the fact that the only true issue involved in this case was as to the efficacy of appellants' products in the treatment of these skin diseases, the jury returned a verdict which, in effect, branded said products as worthless.

We believe that the reasons for this surprising, unjust, and anomalous result will become apparent to this Honorable Court from the subsequent sections of this brief dealing with the errors and attitude of the trial court in the trial of this case.

We, counsel for appellants, sincerely believe that a serious miscarriage of justice has occurred in this case, and we shall herein do everything we can to demonstrate this to this Honorable Court. Particularly so, because this case is of importance to many persons besides appellants. It obviously is of importance to the thousands of persons now suffering from these horrible skin diseases and for which the medical profession admits that it knows no cure, and to whom these Colusa products may one day give that surcease for which they have vainly been searching in their pitiful efforts to rid themselves of the itching, discomfort and pain of these unsightly and miserable skin afflictions.

The Facts as to Appellants' Business.

For several years past, appellant Empire Oil and Gas Corporation has been engaged in the business (under the trade name of Colusa Products Company) of distributing certain products (Colusa Natural Oil, Colusa Natural Oil

Capsules, Colusa Hemorrhoid Ointment) to persons throughout the United States suffering from psoriasis and other skin diseases. Appellant Colgrove is the president and manager of said corporation. (Tr. 161, 254.)

This Colusa Natural Oil is a natural petroleum product, produced from certain wells and seepages in Colusa County, California. The production of this oil is a very expensive process, principally because thousands of gallons of water must be pumped to produce a single gallon of this medicinal oil. (Tr. 25.)

During the past few years, thousands of skin sufferers, scattered throughout the United States, have become users of these Colusa Products. The distribution of these products has been carried on largely by mail order, all sales being made under a rigid guarantee, pursuant to which the customer is entitled to a refund of his money in the event that he is not fully satisfied with the results. (Tr. 177-178.)

Facts as to This Criminal Proceeding.

On March 24, 1942, the United States Attorney for the Northern District of California filed an unverified information against Empire Oil and Gas Corporation and Chester Walker Colgrove, appellants herein, charging them with the violation of the aforementioned Federal Food, Drug and Cosmetic Act. This information consists of three counts, each purporting to charge misbranding under said statute. (Tr. 2-12.)

The defendants entered their pleas of not guilty to all three counts, a jury trial was had in June, 1942, and the jury returned a verdict of guilty as to both defendants on all three counts. (Tr. 302.)

The court imposed fines against the defendant Chester Walker Colgrove of \$500.00 on each count, with an alternative jail sentence (Tr. 311), and a fine of \$1.00 on each

count as to the defendant Empire Oil and Gas Corporation. (Tr. 309.) Appeals have been duly perfected by each defendant, and the record on appeal consists of a printed transcript of record containing the testimony, the Assignment of Errors, and the other requisite papers and data.

SUMMARY STATEMENT OF POINTS ON APPEAL.

In support of their contention that the judgment of the lower court should be reversed, appellants will argue in this brief six major propositions, viz.:

I. The Evidence Is Insufficient to Warrant a Conviction.

II. The Trial Court Committed Highly Prejudicial Errors in Connection With the Testimony of Dr. C. E. Von Hoover, a Vital Defense Witness.

III. The Trial Court Committed Prejudicial Error in Refusing to Admit in Evidence the Voluntary Testimonials Offered by the Defense.

IV. The Third Count Is Duplicitous.

V. The Trial Court Committed Various Other Prejudicial Errors at the Trial.

VI. The Trial Court Erred in Its Instructions to the Jury.

ARGUMENT.

I. THE EVIDENCE IS INSUFFICIENT TO WARRANT A CONVICTION.

(A) Pertinent Assignments of Error.

"Assignment No. I. The Court erred in denying the motions of appellants for a directed verdict of Not Guilty on Count One made by the defendants at the conclusion of the taking of evidence in this cause, which said ruling was duly excepted to by appellants.

Said court erred in this because the evidence was and is insufficient to sustain a verdict of guilty against said defendants, or either thereof, as to said count, and said verdict was and is against the law.” (Tr. 333.)

“Assignment No. II. The Court erred in denying the motions of appellants for a directed verdict of Not Guilty on Count Two made by the defendants at the conclusion of the taking of evidence in this case, which said ruling was duly excepted to by appellants. Said Court erred in this because the evidence was and is insufficient to sustain a verdict of guilty against said defendants, or either thereof, as to said count, and said verdict was and is against the law.” (Tr. 333-334.)

“Assignment No. III. The Court erred in denying the motions of appellants for a directed verdict of Not Guilty on Count Three made by the defendants at the conclusion of the taking of evidence in this case, which said ruling was duly excepted to by appellants. Said Court erred in this because the evidence was and is insufficient to sustain a verdict of guilty against said defendants, or either thereof, as to said count, and said verdict was and is against the law.” (Tr. 334.)

(B) The Settled Law as to Duty and Right of Appellate Court to Upset Verdict Where Evidence Insufficient.

At the outset of our argument under this point, we desire to state that we are fully mindful of the rule of law, often enunciated by this Honorable Court, that such a tribunal will not disturb a verdict where there is a substantial conflict in the evidence adduced by the respective parties in the lower court.

Equally well settled, however, is a rule which we invoke herein. We rely upon the rule of law that in order to sustain a criminal conviction, the evidence adduced in the lower court must be sufficient to prove the guilt of the defendants beyond a reasonable doubt, and must exclude every other hypothesis than that of guilt. The fol-

lowing are a few enunciations of this settled legal principle.

“It has been held in a long line of decisions in substance that, unless there is substantial evidence of facts which exclude every other hypothesis than that of guilt, it is the duty of the trial judge to direct the jury to return a verdict for the accused, and, where all the evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment against the accused.” (Citing cases.) *Graceffo v. United States* (C. C. A. 3, 1931), 46 Fed. (2d) 852, at 853.

This rule is also stated in *Von Gorder v. United States* (C. C. A. 8, 1927), 21 Fed. (2d) 939, at 942, as follows:

“This is a criminal case. * * * If he is innocent of the crime charged against him, an irreparable injury will be inflicted upon him by the affirmance of the judgment before us. After a careful scrutiny of all the evidence and the proceedings in the trial of this case, we cannot divest our minds of the conclusion that there was not sufficient evidence of the guilt of the accused at his trial to sustain the verdict of his conviction under the established rules of law to which reference has been made.”

Another statement of this rule is to be found in the early case of *Union Pacific Coal Company v. United States* (C. C. A. 8, 1909), 173 Fed. 737, 740, viz.:

“There was a legal presumption that each of the defendants was innocent until he was proved to be guilty beyond a reasonable doubt. The burden was upon the government to make this proof and evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction. (Citing many cases.)”

In each of said three cases aforementioned, a Circuit Court of Appeals reversed a conviction on the same ground we rely upon herein, the insufficiency of the evidence in the lower court.

(C) Application of Said Rule of Law to the Instant Case.

We contend that not only is the evidence in our case insufficient to exclude every other hypothesis but that of guilt, but, to the contrary, *the undisputed evidence clearly demonstrates the innocence of these defendants.*

In an effort to prove this contention, we will first analyze the three counts in the information in order to define the true and controlling issues; secondly, we will present a summary review of all of the evidence; and thirdly, we will then undertake to show the insufficiency of this evidence in the light of said true issues in the case.

(1) THE TRUE ISSUES IN THIS CAUSE.

The Information.

The information (Tr. 2-12) is in three counts. The first (Tr. 2-7) alleges that appellants shipped in interstate commerce, from Berkeley, California, to Mountainair, New Mexico, a package containing a number of bottles of Colusa Natural Oil; that each bottle bore a certain label (which is set forth on page 3 of the Transcript); that enclosed in this package of bottles was a certain circular and newspaper mat, containing various statements which are quoted *verbatim* in the information. (Tr. 4-6.) The information then proceeds to allege that said drug was misbranded within the meaning of the Federal Food, Drug and Cosmetic Act, because *these various statements* appearing in this circular and quoted in the information were **FALSE AND MISLEADING**

IN THAT

“Said statements represented and suggested that said drug, when used alone or in conjunction with

Colusa Natural Oil Capsules, would be **EFFICACIOUS IN THE TREATMENT OF** eczema, psoriasis, acne, ringworm, athlete's foot, burns, cuts, poison ivy and varicose ulcers; would act on surface skin irritations as a stimulant and would increase circulation and aid in healing; would be efficacious to relieve discomfort and pain; would be efficacious to inhibit the spreading of skin irritations and to restore the normal skin surface, and would be efficacious to kill or check disease germs." (Tr. 6.)

The information then proceeds to allege that said drug would not be efficacious for any of said purposes, and was therefore misbranded.

The Second Count.

The second count (Tr. 7-10) is substantially the same as the first. It involves the same shipment to New Mexico but refers to a package containing bottles of Colusa Natural Oil Capsules. These are simply Colusa Natural Oil in capsule form. The charges with respect to misbranding are identical with those set forth in the first count.

The Third Count.

The third count (Tr. 10-12) involves the same shipment to New Mexico but refers to a package containing a number of jars of Colusa Hemorrhoid Ointment. This count really consists of *two distinct charges* or alleged offenses. The first is an alleged misbranding. With respect to this first phase, the information charges that enclosed in the package was a circular containing the following statement:

"Colusa Natural Oil Hemorrhoid or Piles Ointment. For external use in relieving the discomforting irritations of Hemorrhoids or Piles * * *" (Tr. 11.)

The third count then proceeds to charge that said hemorrhoid ointment was misbranded in that the said statements in said circular regarding the efficacy of the

drug were *false and misleading*, **IN THAT** these statements represented and suggested that the drug would be efficacious in the treatment of hemorrhoids and piles, whereas in truth and in fact, said drug would not be efficacious in the treatment of hemorrhoids and piles.

The second (and wholly distinct) phase of the third count consists of the charge, at the end thereof (Tr. 12), that said hemorrhoid ointment was misbranded in that it was in package form and its label did not bear an accurate statement of the quantity of the contents in terms of weight or measure.

Under this information (putting aside for the moment said second phase of the third count) *the only true and controlling issue was and is as to the efficacy of these Colusa products in the treatment of the respective ailments referred to in said three counts in the information*. We stress this because many irrelevant and false issues were created by the Government in connection with the trial of this cause, which no doubt confused the jury and obscured the utter weakness and insufficiency of the government's evidence with respect to said controlling issue.

(2) SUMMARY REVIEW OF EVIDENCE.

The Government's Case in Chief.

At the outset, and to save time and government expense, defendants stipulated to the making of the shipments referred to in the three counts in the information, the labeling of these shipments, and to the identity of certain samples taken therefrom by the Government's agents. (Tr. 15-18.)

Thereupon, the Government called *ten* witnesses who comprised its entire case in chief, all testifying as "experts", viz.:

The first two (*Buell*, Tr. 18-33; *Yakowitz*, Tr. 33-39), chemists of the Federal Food and Drug Administration, testified as to what they considered to be the constituents of this Colusa Natural Oil. (Tr. 19.) This testimony was

based upon a chemical analysis made by them in less than two days' time. (Tr. 30.) Neither of these witnesses had ever analyzed petroleum oils for the petroleum industry (Tr. 29, 37), and both admitted on cross-examination that the petroleum family (hydro-carbons) is a very complex chemical family or series of families, and that the process of determining all the constituents of a crude oil by fractional distillation requires months of chemical research. (Tr. 29, 38.) Even counsel for the Government admitted the complexity of said matter:

"Mr. Gleason. Counsel, if you want to know about it, the relevancy is simply this: that out of a given crude oil there are hundreds of different compounds that are produced by this fractional process and they can't be produced in two hours' time or two days' time.

"Mr. Zirpoli. I recognize that and we all know it." (Tr. 39.)

The next witness, *Dr. Anna Mix*, also a chemist in the Federal Food and Drug Administration, testified that she examined a bottle of Colusa Natural Oil to determine the presence of radium emanations or radioactivity, but found none. (Tr. 39-42.)

The Government then called two bacteriologists (*Mary Smith*, Tr. 42-45 and *Nicholas Leone*, Tr. 45-50) who testified as to certain laboratory tests which they, in collaboration, made of Colusa Natural Oil. These tests were made to see if this oil would destroy or inhibit *two* germ organisms, the first being *staphylococcus aureus* (the ordinary pus forming organism), and the second, the typhoid fever organism. (Tr. 43.) They admitted that there are literally millions of germ cultures which could have been used. (Tr. 43.) They also stated that they used these two because they are generally used in testing for germicidal qualities. They made no tests of the oil on any organism, germicidal or otherwise, involved in psoriasis or these other skin diseases. In fact, Government counsel expressly disclaimed that the evidence up to this point related at all to skin diseases.

"Mr. Zirpoli. We haven't had any evidence in this trial yet as to what skin diseases. The Government has the witnesses, and will submit them, on that particular subject. The issue in so far as this witness is concerned is not with relation to those diseases. There is a claim that it is germicidal, and he is testifying solely as to whether or not it will kill germs.

"Mr. Doyle. Typhoid germs.

"Mr. Zirpoli. Typhoid and the common pus germ that he has testified about.

"Mr. Doyle. That is all.

"Mr. Zirpoli. Yes, I agree that that is all he testified about." (Tr. 49-50.)

The remaining *five* witnesses of the Government were doctors. The first, *Dr. Tainter* (Tr. 50-65), a professor of pharmacology, testified as to certain things he found by a simple examination of a sample of Colusa Natural Oil (i.e., that it was not astringent, not irritating, did not contain iodine, camphor or radium emanations, etc.) (Tr. 51-53.) Over objection of the defense he then voiced various opinions, including the opinion that this oil would not be effective in the treatment of the various skin diseases involved in this case. (Tr. 53-59.) On cross-examination, he admitted that he was not a dermatologist; that he had never treated any of the skin diseases mentioned in the information, nor had he made any clinical or other tests of this oil on any of said skin diseases. In fact, he disclaimed any real knowledge of psoriasis, viz.:

"Mr. Gleason. Q. That (psoriasis) is one of the most difficult skin diseases known to the medical profession, is it not?

"A. I am not qualified as a dermatologist, so I couldn't answer." (Tr. 61.)

He likewise admitted:

"There are many diseases for which we do not have the real remedy because we do not know the real causative agent. Yes, the medical profession has a great many diseases as to which it does not know the true cause." (Tr. 62.)

He likewise admitted that the Colusa Hemorrhoid Ointment might be palliative in relieving the itching incident to hemorrhoids, that "it might help the itching temporarily, but would not cure the condition." (Tr. 55.)

Dr. James W. Morgan (Tr. 65-68), a specialist in rectal cases, testifying *purely hypothetically* (on the basis of the ingredients of the Colusa Hemorrhoid Ointment as related to him in court by Government counsel) voiced the opinion that such an ointment would not be beneficial in the treatment of hemorrhoids. He admitted, on cross-examination, that he had never seen the Colusa Hemorrhoid Ointment, or ever used any of it, and that his opinion as to its efficacy was purely hypothetical (Tr. 66) and that the specialists in his field have varying views as to the efficacy of ointments. (Tr. 67.)

Dr. Harry Templeton (Tr. 68-70), specializing in syphilology and dermatology, *also testifying purely hypothetically* on the basis of the recited ingredients of Colusa Natural Oil, and without ever having seen or used this product, voiced the opinion that it would not be efficacious in the treatment of psoriasis and the other skin diseases mentioned in the information. His cross-examination concluded:

"Psoriasis is a very difficult disease and I know no cure for it." (Tr. 70.)

Dr. George Kulchar (Tr. 70-75), a specialist in syphilology and dermatology, also testified *purely hypothetically* and without ever having seen or made any use or clinical tests of Colusa Natural Oil. He voiced substantially the same opinions as Dr. Templeton (i.e., that these Colusa products would not be efficacious in the treatment of psoriasis and these other skin diseases). On cross-examination, he was asked if he recalled a former patient of his, Mrs. Gilbert Mead, and he stated it was possible that he had treated her for psoriasis, but that he did not recall her. Mrs. Mead was then asked to stand up in the courtroom so as to be identified as his former

patient. Counsel for the Government objected, and thereupon counsel for the defense stated the following, viz.:

“Mr. Gleason. Yes, your Honor. I am trying to cross examine this expert, or so-called expert, on psoriasis, and I am going to use as the basis of my cross-examination a patient of his by the name of Mead.” (Tr. 75.)

Strangely enough, and in spite of the fact that the witness had theretofore qualified himself as a specialist in dermatology and had voiced a very definite opinion as to the lack of efficacy of these Colusa products in the treatment of psoriasis and other skin diseases, he thereupon (no doubt well remembering his complete failure in the treatment of Mrs. Mead) immediately volunteered:

“The Witness. I do not wish to qualify as an expert on psoriasis.” (Tr. 75.)

The last witness for the Government was *Dr. Frederick Fender* (Tr. 75-77), a surgeon and clinical instructor at Stanford University in surgery. He also *testified purely hypothetically*, and voiced the opinion that Colusa Natural Oil would not be efficacious in the treatment of varicose ulcers, and that the taking of the oil in capsule form would not prove efficacious in the treatment of varicose ulcers. (Tr. 76.) The following then occurred, viz.:

“Q. Would the two taken in conjunction prove efficacious?

“A. I wish we could find any combination that would, of anything.” (Tr. 76.)

On cross-examination, he admitted that he had never used this oil in the treatment of any patients. (Tr. 77.)

The Defense Evidence.

The defendants, constantly urged by the court to proceed and get through with their case (p. 68, *infra*), called nineteen witnesses to the stand, most of them being laymen who had successfully used these Colusa products to treat the very diseases involved in this case. Had time

permitted, we could have called literally dozens and dozens more grateful users to describe their success in treating their horrible and severe cases of skin diseases with these products. (See Testimonials, Exhibit Q-1 for Identification.) (Tr. 181-250.)

In view of the fact that the true and only controlling issue in this case was as to the efficacy of this Colusa Natural Oil in the treatment and relief of the skin diseases mentioned in the information, the defense, because of these time limitations, decided to devote their case to *direct, actual and concrete proof of the use and effectiveness of these products in the treatment of these very skin diseases*, rather than to refuting the unimportant and collateral technical and theoretical matters injected by the Government's case (which matters, in our humble opinion, really had no material bearing on the aforementioned true and controlling issues). We have in mind such technical matters, for example, as the rather nebulous subject of the penetrating effect and power of radium emanations (which subject played a prominent part in the Government's case), or the equally irrelevant technical Government evidence as to the inability of this Colusa Natural Oil to kill *typhoid* germs. In short, to demonstrate that this Colusa Natural Oil and its related products were efficacious and meritorious, the defense called to the witness stand many witnesses from various walks of life, who testified, in a simple and straightforward manner, as to their experience in the use of this oil and as to its effectiveness. Some of these witnesses proudly exhibited their clean skins as living testimonials to the efficacy of these Colusa products. *Not one line of this testimony was refuted, nor was any one of these witnesses impeached in any manner whatsoever.* Various photographic exhibits, showing the skin conditions of these persons "before" and "after" their use of Colusa Natural Oil were also introduced.

The first defense witness, *Frank Fazio* (Tr. 77-79), a barber, aged fifty-four, testified to the splendid results

achieved by him *in three weeks' time*, in clearing up a very severe case of psoriasis, *of twenty-seven years' standing*, and which had baffled many noted institutions (Battle Creek Sanitarium, etc.) and various skin specialists.

Dr. William G. Woodman (Tr. 79-82), an osteopathic physician and surgeon from Los Angeles, with unlimited license to practice, and a member of the staff at the Los Angeles County Hospital, testified as to his very successful use of these Colusa products in various severe psoriasis cases. He also testified as to how the Federal agents had attempted to dissuade him from appearing as a witness in this case (Tr. 82) (which testimony was later disputed by a government agent. (Tr. 271).)

Donald R. Crawford (Tr. 83-85), a ticket seller for the Union Pacific Railroad at Los Angeles, testified as to the excellent results achieved by him in treating his annually recurring and very severe attacks of poison oak. He told of his first using this oil one night when the affliction was so severe he could not lie in bed and had just saturated a turkish towel with the weeping secretion of the blisters. (Tr. 83.)

"I applied the oil at one o'clock in the morning, and at one-thirty that weeping stopped and you could practically see that thing heal. Inside of one week I was back on the job with no more time lost." (Tr. 83.)

He testified that he had a recurrence in 1941, and immediately used this oil and had it quite well cleared up in three days' time.

"In previous years I had tried countless remedies; none ever gave me the relief that Colusa Natural Oil gave me." (Tr. 84.)

He also was visited by the Federal Food and Drug agents who told him he "might just as well use a crank-case oil." (Tr. 84.)

Henry N. Stabeck (Tr. 85-87) of Los Angeles, aged sixty-seven, a retired investment banker, testified as to the quick cure of an athlete's foot by the use of this Colusa Oil, and also of his successful use of Colusa Oil Capsules to clear up a long standing ulcerated stomach condition for which he had previously treated with various doctors.

Josie Mead (Tr. 87-89), a hairdresser from Oakland, then told of clearing up a very severe case of psoriasis with this Colusa Natural Oil. This woman suffered from this disease for about three years, and had unsuccessfully treated with various skin specialists, including Dr. Kulchar, the Government's "expert". She testified as to Dr. Kulchar's wholly unsuccessful efforts to treat her case.

"He tried x-ray, gave me quartz and various shots, gave me medicines and then he finally put methylene blue on my feet and painted those twice in two weeks, told me to use aromatic spirits of ammonia to remove that. My feet broke down and he said I didn't respond." (Tr. 87-88.)

She further testified that Dr. Kulchar gave her a preparation which took the skin off her feet. This is the same Dr. Kulchar who testified so freely, as an expert for the Government, as to the inefficacy of Colusa Natural Oil, without ever having even attempted to test it. She also testified that Dr. Kulchar finally told her that she was ruining his reputation. (Tr. 87.) She also described the horrors of this disease as follows:

"This disease affected me all over; I suffered day and night; the itching was terrible; it affected my feet, knees, elbows and the palms of my hands, accompanied by this scaly condition." (Tr. 88.)

She then testified that she had, in desperation, used Colusa Natural Oil, *only four weeks previously to her being called as a witness in this case*, and that in that short space of time, she was almost completely cured of this severe ailment.

“I took the capsules and the oil for this psoriasis condition and it began to soothe me, and in five days I was so relieved that I couldn’t express my gratefulness. I am almost completely cured.” (Tr. 88.)

The witness also identified a bottle which she said was the methylene blue prescribed by Dr. Kulchar and which took her skin off, the last of the several treatments which this “expert” unsuccessfully used in connection with her case.

There was no cross-examination.

Mrs. Teresa Loughran (Tr. 89-90), aged sixty-two, told of being bedridden for a long period by a severe leg ulcer which she completely cleared up in the space of about *three weeks* with Colusa Natural Oil.

Mrs. Agatha Harless (Tr. 91), a housewife, testified that after treating in vain with various doctors and trying x-ray and various other treatments, she completely cleared up a very severe case of eczema which covered her hands and wrists. This woman had also been treated, without success, by Dr. Kulchar, the Government’s expert, and other doctors.

Mrs. Rena Gerlach (Tr. 92), a housewife, told of the horrible skin disease which covered her hands and arms, and which so incapacitated her that her son had to feed her. She related how she had consulted various specialists and had used almost every patent medicine on the market, all without success. Finally, early in 1942, Colusa Natural Oil completely cured her *in about three weeks*. This witness removed her gloves and exhibited her clean hands and arms to the jury. She also described in detail the horrible suffering and anguish incident to this disease:

“This disease was all over my hands and went up to my arms, just running all the time; I had to keep my hands raised up, and because they were so sore I couldn’t touch anything. My son had to feed me most of the time; my skin was running and itching;

my hands would swell three times their normal size.
 * * * I couldn't sleep; I couldn't feed myself; I
 couldn't wash my face. With two hands tied up you
 can't do anything." (Tr. 92.)

Howard Everett (Tr. 93-95), aged seventy-five, a former banker now residing in Los Angeles, who has had hemorrhoids for thirty-five years and has treated with many doctors and has tried everything available at drug-stores, testified as to the excellent effect of Colusa Oil in relieving and treating this ailment.

"This ointment gives greater relief than any product or treatment I ever had." (Tr. 93.)

The next witness for the defense, *Dr. W. T. Vincent* (Tr. 96-109), seventy-eight years of age, a practicing physician from Houston, Texas, undoubtedly knows more about these Colusa products and their effectiveness in the treatment of these skin diseases than any other pathologist in the United States. The professional medical career of this man has extended over a period of fifty-two years, during all of which time one of his specialties has been dermatology. He testified that he had treated practically all skin diseases during this practice, including *all* of the **diseases** mentioned in the information in this case. He further testified that psoriasis is considered very difficult to cure, and that many doctors have said it is incurable; that he had begun to use Colusa Natural Oil in the treatment of his patients a little over three years ago, and has used it hundreds of times in many cases of psoriasis, eczema and the other skin diseases involved in this case. This kindly and able old gentleman then proceeded to describe, in detail, various of these cases of severe skin diseases which he had thus successfully treated with this Colusa Natural Oil. Included in these was the Carl Alsobrook case, one of the severest and most terrible cases of psoriasis he had ever seen. This patient was almost a solid scab of scales and lesions on his back and chest when the treatment began, and after treating him with

Colusa Natural Oil for a period of months, *this condition completely cleared up*. "I cured him absolutely with this oil." (Tr. 97.)

Photographs (Def. Ex. D and E) were produced and identified by the doctor depicting the progress of Mr. Alsobrook's case. After describing other difficult cases successfully treated with this oil, the doctor then went on to describe in detail the beneficial results which he observed from the use of this product, including among these the palliative or quieting result accomplished by the immediate stopping of the itching and pain. He was very positive in his statement that Colusa Natural Oil had quickly mitigated the itching and pain incident to these diseases, and did this in practically every case, almost one hundred per cent and immediately. (Tr. 100.) He also testified to the very excellent penetrating effect of this oil into the skin and the actual healing, and restoration of new skin which would ensue shortly after the stopping of the itching and the alleviation of the skin lesions. He testified, on the basis of his long and extensive use of this oil in these various and assorted cases of skin diseases, that his firm conviction was,

"I know it is the best treatment I have ever used."
(Tr. 100.)

He also testified that he had used the Colusa hemorrhoid ointment in treating cases of hemorrhoids, and had found it very satisfactory in relieving the itching and burning incident to this condition. He also stated that he himself had suffered from that condition and had used this ointment and had found that it stops the itching immediately. (Tr. 102.)

The witness was subjected to a lengthy cross-examination, but none of his testimony with respect to these various cases treated by him with Colusa Natural Oil was in any manner impeached or weakened. To the contrary, he demonstrated, on this examination, a wide knowledge of

these skin diseases and reemphasized the effectiveness of these Colusa products in the treatment of such diseases.

Miss Evelyn Costello (Tr. 109-110), a young typist from San Francisco, testified to the quick relief of a long standing (seven years) severe case of eczema, for which she had treated for three years at Mayo Brothers and with many other doctors. She likewise presented her clean hands and arms as living proof of the effectiveness of this Colusa Oil.

Marco Sablich (Tr. 110-111), a San Franciscan, told of suffering for over twenty-three years with a severe case of psoriasis; of having treated with over thirty doctors; of going to Europe in a vain search for a cure; and of the great clearing up and improvement of his condition which he had accomplished by *five weeks' use* of this Colusa Oil, immediately preceding his appearance in this case.

Miss Adele Davis (Tr. 111-112), a beauty operator from Oakland, testified as to the clearing up of a long standing and miserable case of eczema by use of Colusa Oil, which gave her such immediate relief that: "Really to me it was magic." (Tr. 112.)

Dr. Gilbert L. Mead (Tr. 112) testified as to his successful use of Colusa Natural Oil on a severe burn, suffered by him two weeks previously to his being called as a witness in this case.

The next witness for the defense was *Dr. C. E. Von Hoover*. (Tr. 112-157.) This witness was perhaps the most important witness for the defense, because he was a highly trained pharmacologist who, together with his laboratory associates, had made extensive clinical and laboratory tests of these Colusa products, tests which involved the application of Colusa Natural Oil to many severe cases of the very skin diseases involved in this case. Appellants contend that the trial court committed highly prejudicial errors in connection with the testimony

of this witness, and inasmuch as this testimony will be reviewed in detail and at length in another main section of this brief (see pp. 33-49, *infra*), we will not argue it herein, but will respectfully request this Honorable Court to consider the statements and review of his testimony which is to be found in said subsequent portion of this brief as having been set forth also at this juncture.

Mrs. Opal Cameron (Tr. 157-158) testified as to the effectiveness of this Colusa Natural Oil in treating her severe case of eczema from which she has suffered since childhood.

Mrs. Wilma Welch (Tr. 158) testified as to the instant relief given to her by the use of Colusa Natural Oil on her case of athlete's foot.

Arthur W. Scott (Tr. 158-160), a shipyard welder, told of his successful use of this oil on severe burns and also on cuts.

The last witness for the defense was *C. W. Colgrove* (Tr. 161-259), one of the defendants. Inasmuch as Mr. Colgrove's testimony will be dealt with in various other portions of this brief, we will not review it at this juncture.

Government's Rebuttal Evidence.

It is quite evident from the record in this case that the Government's investigators scoured the country hoping to find people who had used this oil and who would testify that it failed to help them. The record shows that these agents visited some of the defense witnesses; that inspectors went over Dr. Von Hoover's records in San Antonio; that they checked on various patients of Dr. Vincent in Texas; and they no doubt did all they could to find dissatisfied users. Perhaps the most striking tribute to the efficacy of this natural oil lies in the complete failure of the Government to achieve any material measure of success in its efforts to find disgruntled users among the

thousands of persons who have used said remedy during the past few years.

The Government produced only five "user" witnesses in rebuttal whose testimony in no manner rebutted, destroyed or impaired the aforementioned defense evidence, viz.:

Homer H. Baumgartner (Tr. 261-263) of Los Angeles was suffering in 1940 from eczema. A friend put him in touch with Mr. Colgrove who had photographs made of his hands, first to show their terrible condition and then "after" the use of this oil. (Def. Ex. O.) Baumgartner, who was given this oil without charge, said that he did not credit the oil alone, but had used it in conjunction with an electric lamp. However, he admitted on cross-examination:

"I then had this disease for sixteen years; I previously had gone to doctors but they had not cured this disease; they did not give me as much relief as I got from Colusa Oil; with the oil and lamp together I got relief for a short period; I never tried the lamp alone before nor since." (Tr. 263.)

Incidentally, Baumgartner's own sworn testimonial (Def. Ex. O), given in 1940 when he was grateful for the excellent results accomplished by Colusa Natural Oil (which sworn testimonial and the facts shown by the photographs therein were confirmed by him), clearly show the efficacy of this product and likewise confirm the very conservative claims made by appellants with respect to its effectiveness.

The Government then called one *Amos Guidry* (Tr. 264-266), one of Dr. Vincent's patients in Houston, Texas. He testified he had received some injections in addition to using this oil, and did not see that the oil had helped him. He did admit, however, that when he first met Dr. Vincent the disease covered his face (Tr. 265); that he was ashamed to go on the streets, and that prior to treating with Dr. Vincent, he had never found anything which

gave him relief. He further admitted that this oil did not make the itching worse, and today he is a grocery clerk.

The next witness was *Harry Anderson* (Tr. 266-267) of Ephriam, Utah, who testified he used this oil for *one week* for an eczema condition, and noticed no improvement; that he had this condition for two weeks before using the oil; that he then used a home remedy of sulphur and lard and cured this touch of skin trouble.

We might note, in passing, that the Government was so hard pressed to find dissatisfied witnesses, they had to bring this carpenter all the way from Utah to testify as to this very minor case of eczema on which he used the oil for only one week.

The next witness was *Mrs. Hosford* (Tr. 267-269) of Boise, Idaho, who used the oil in July and August of 1941 for psoriasis. She found no improvement and still suffers from this condition. On cross-examination, she said she had suffered for over five years and had gone to various specialists in a vain effort to find relief; that she had been told by them that the medical profession could do nothing for her condition. Her family doctor, Dr. Smith, advised her that, "All we could do is experiment on you, because they have not found anything yet to cure it". (Tr. 269.) She testified that the use of this Colusa Oil made her legs sore. In this connection, it might be noted that while this Government witness testified this oil had an irritating effect, the experts who had never tried it testified that in their opinion it was not an irritant. This witness testified further that after she had used practically all of the oil, she went back to the drug-store and asked for a refund of her money and promptly received it.

The Government then called one *Milne* (Tr. 270-271) from Chicago, a charity patient from the Cook County Clinic, who had suffered from varicose ulcers for twenty-five years. After medical treatment for a quarter of a

century, he tried this oil for *two weeks* on his hopeless case, and noticed no improvement. He finally resorted to surgery. He admitted on cross-examination that it would generally take *six months to a year* for any of his previous remedies or treatments to benefit or improve his condition. *Yet he used Colusa Oil for only two weeks on this hopeless case!*

Mr. Milne was the last of these very few "user" witnesses of the Government. Again we reiterate, the inability of the Government sleuths (after their scouring of the nation) to produce any stronger "evidence" than these few isolated and unimportant cases, presented in rebuttal, is perhaps the most striking and effective tribute to (and proof of) the efficacy of these Colusa products in the treatment of these horrible skin diseases involved in this case. For, had these products not been efficacious in the thousands of cases in which they have been used during the past three years, we undoubtedly would have witnessed a veritable parade of disgruntled users to the witness stand in the lower court. Instead, we find such pitifully weak evidence as that of the Utah carpenter who tried Colusa Oil for but *a week*, and the charity patient from Chicago who tried it for *a couple of weeks* on a hopeless case of leg ulcers.

Having thus defined the controlling issues and briefly reviewed the evidence, we will now undertake to show:

(3) THE INSUFFICIENCY OF THE GOVERNMENT'S EVIDENCE.

The exact state of the evidence can, we believe, be boiled down to a very simple equation. On the one hand, the Government's case consisted practically entirely (insofar as said controlling issues are concerned) of the opinions of these so-called "expert witnesses", not one of whom had even taken the trouble to use or properly test these Colusa products. On the other hand, we find clear-cut and uncontradicted testimony of the many defense witnesses as to the excellent results achieved *in treating*

these very skin diseases with these Colusa products. In short, the Government's case is one of unsupported **THEORY**; the defense proof consists of concrete and undisputed **FACT**.

At the very best, this "opinion evidence" of the Government (if it may be dignified by being called evidence) is the very weakest type of evidence known to the law. The courts have often so characterized it. Here are a few typical expressions:

"Expert testimony is regarded by the law as the weakest character of testimony." (*Kentucky Traction & Terminal Co. v. Humphrey*, 182 S. W. 854, 856.)

"Such testimony, as has often been held, is of the weakest character and should be received and weighed with great caution." (*Strode v. Strode*, 240 S. W. 368.)

See also, 11 *Ruling Case Law*, 587, § 16, and the many authorities therein referred to.

The reasons for this prevalent attitude of the courts with respect to such "opinion evidence" are well stated in the following authority, viz.:

"The general and persistent disagreement of authority on many lines of professional and scientific inquiry, the fact that this class of evidence deals so largely with the problematical and the conjectural, and that there are other elements of unreliability arising from human frailty, bias, loyalty to one's employer, pride of opinion, self-interest, or the heat engendered by controversy, which more or less unconsciously warp the mind of the witness even without the more vulgar elements of venality and the absence of any efficient punishment for perjury, have caused courts of the highest eminence to feel that experts are frequently rather the hired advocate of the parties than men of science placing their special experience at the service of the cause of justice. Such courts have naturally characterized this class of evidence unfavorably and have ruled such evidence should be received with 'caution', 'with narrow scrutiny and with much caution', and never received

at all except when absolutely necessary.” (17 *Cyc.* 267.)

This strong language which the courts have used in condemning “opinion evidence of experts” is, we respectfully submit, particularly appropriate in our case. Not only are the “opinions” of the Government’s experts herein, as to the lack of efficacy of this Colusa Natural Oil, predicated upon a most sketchy and incomplete analysis of this petroleum oil (see p. 11, *supra*), but they are wholly unsupported by any proper tests of this oil or use of it in the treatment of the skin diseases involved in this case. Is it not little short of startling, your Honors, that the Government, with all of the laboratory and clinical facilities at its command and the vast array of scientists in its various services, *did not put this oil to the acid test by clinically testing it on these skin diseases!*

Under the admitted circumstances, these so-called “expert opinions” of the Government’s witnesses are, we respectfully submit, nothing more than “guesses” on the part of these “experts”. As such, we believe they well merit the condemnation voiced by the Missouri Court in *Graney v. St. Louis, etc. R. R. Co.*, 157 Mo. 666, 682, 57 S. W. 276, 50 L. R. A. 153:

“Of course, such testimony, to dignify it by that title, with neither knowledge nor experience on which to base it or with which to back it, is simply worthless; neither courts nor juries are required to believe it. If they do, the esophagi of their credulities must be abnormally dilated or else permanently enlarged. Opinions such as these, grounded on mere conjecture or speculation, are inadmissible. Lawson, *Exp. Ev.* (2d Ed.) 498 et seq.; Rog. *Exp. Test.* (2d Ed.) pp. 33, 34, § 13.”

In this *Graney* case, *supra*, the Missouri court reversed a verdict in a death case involving a boy who was killed by defendant’s train. The controlling factual issue was whether or not the air currents set up by the passing train

had "sucked" the boy into contact with the train. The plaintiff called, as an expert witness, a college professor, a physicist of twenty-three years' experience in the testing and observation of air currents and their force and effect. This "expert" voiced an opinion that the train could have thus "sucked" the boy into contact with it, and gave his reasons for such belief. The upper court, in thus condemning this "opinion" as a mere conjecture, pointed out that which is true in our case, viz.: the "expert" *made no tests sufficient to give him actual factual data upon which to base his opinions.*

At page 682, the court in the *Graney* case also said:

"The courts, in our opinion, have gone quite far enough in subjecting life, liberty, and property of the citizen to the mere speculative opinions of men claiming to be experts in matters of science, whose confidence in many cases bears a direct similitude and ratio to their ignorance. We are not 'disposed to extend this doctrine into the field of hypothetical conjecture and probability. * * *'"

And, as Justice Peckham stated, in *Roberts v. N. Y. Elevated Railroad Co.*, 128 N. Y. 455, 28 N. E. 486, in similarly pointing out the weakness of expert "opinion" evidence:

"It is none the less conjecture and speculation because the expert is willing to swear to his opinion. He comes to the stand to swear in favor of the party calling him, and it may be said he always justifies by his works the faith that has been placed in him."

Such expert opinion evidence is, of course, an exception to the general rule of evidence and should not be encouraged or resorted to except when necessary:

"Opinions, even expert opinions, are allowed by way of exception to the general rule that a witness is to give the facts observed, but not his conclusions from them, and they are to be allowed only when there is real helpfulness or a necessity to resort to them." (*Hamilton v. U. S.*, C.C.A. 5, 73 Fed. (2d) 357.)

We find, therefore, that the Government's case consists practically entirely of just such "opinion" testimony (conjectures) as is condemned by the foregoing authorities as being the weakest type of evidence.

Arrayed against this flimsy so-called evidence of the Government was the positive and uncontradicted testimony of the various users of these Colusa products, who described in detail, each in his or her own way, the very effective results actually accomplished by the use of these products in the treatment of the very skin diseases involved in this case. These people actually suffered from these very diseases. They well knew and described the horrors and pain of such miserable afflictions. They also well knew and described the quick and effective relief which these Colusa products provided for such misery. *These were facts, not theories.* Mr. Fazio's scaly body was a fact, not theory. Likewise factual, not theoretical, was his subsequent clean skin, cleared up by this Coulsa Oil!

We sincerely believe that it requires little further argument, in view of the state of the evidence, to demonstrate the utter insufficiency of the Government's case. Certainly, your Honors, this so-called evidence of the Government is not sufficient to comply with or fulfill the requirement (under the settled rule of law above referred to) that the guilt of a defendant in a criminal case must be established by competent evidence which excludes every other hypothesis but that of guilt.

Incidentally, the situation in our case is substantially the equivalent of that in *U. S. v. Natura Co.*, 250 Fed. 925. That was a Food and Drug case, tried by Judge Dooling. The Government's case consisted practically entirely of "expert" testimony. After calling attention to the settled rule that in a criminal case the Government must prove the guilt of the defendant beyond a reasonable doubt, Judge Dooling stated that the Government had failed to do this. He therein summed up the situation, in

finding the defendant not guilty, in language quite descriptive of our case:

“It may be said in a general way that the testimony of the Government was chiefly ‘expert’ testimony, that is to say, testimony of skilled persons as to the possible effect of the use of Akoz. None of them had ever experimented with it, or tried it either on themselves or others, nor had any of them ever had the opportunity to observe any results from its use. The testimony for the defendant was given by witnesses, physicians and others who had used the medicine themselves, or had observed its effect on others, and all testified to its beneficial effects.”

This ruling of Judge Dooling was simply an application of the settled rule of law and common sense that more weight should be given to “factual” as distinguished from “theoretical” testimony. This Honorable Court well expressed this rule in *Overweight Counterbalance Elevator Co. v. Improved Order of Red Men’s Hall Assn.* (C.C.A. 9), 94 Fed. 155, at 161:

“The value of expert testimony generally depends upon the facts stated as a reason for their opinions and conclusions. * * * More weight is given to the testimony of a witness based upon facts within his own knowledge and experience than to the testimony of a witness which is ‘largely the assertion of a theory’.”

To the same effect:

Stentor Electric Mfg. Co. v. Klaxon Co., 30 Fed. Supp. 425;

Bene v. Jeantet, 129 U.S. 683, 9 Sup. Ct. 428.

And, in connection with the foregoing, it must be borne in mind that at no time did appellants ever advertise or represent that their products would *cure* anything. Nor did the Government allege or attempt to prove any such representation. To the contrary, the very most that the Government charged was that appellants represented their products to be “*efficacious in the treatment of*” these skin diseases. “Treatment” means, of course, *the giving of*

any relief in connection with such diseases. (Tr. 285.) While the undisputed evidence herein clearly shows that this Colusa Natural Oil has actually completely cured and eliminated various stubborn and severe cases of these skin diseases, it would have been sufficient if the evidence had gone no further than showing that this oil merely alleviated or mitigated the itching and irritations incident to said diseases, instead of curing them.

When the facts shown by the record are reduced to their essence, it is seen that the very least that can be said is that appellants have been engaged in distributing to skin sufferers products which are admittedly non-toxic, under a rigid money-back guarantee, protecting the purchasers if these products do not achieve the desired results, products which unquestionably are efficacious in the treatment of these skin diseases.

Frankly, your Honors, is it the spirit or purpose of our law to condemn citizens as criminals under such circumstances as are shown by the record herein? Appellants, dealing with the public in a "fair and square" manner, have brought much needed relief to thousands of skin sufferers. The courts have often pointed out that the purpose of the Food and Drug legislation is to protect the public health and that it is not the purpose of such legislation "to punish merchants who conduct business by customary methods with no intent to deceive purchasers or injure public health." (*Hall Baker Grain Co. v. U. S. (C.C.A.)*, 198 Fed. 614.)

We respectfully submit, therefore, that, for the reasons hereinabove set forth, not only does the evidence in our case fail to show the guilt of appellants beyond a reasonable doubt, but, to the contrary, the undisputed factual evidence clearly shows their innocence. This statement applies both to the first and second counts, which, as shown hereinabove, are substantially identical. (See p. 10 *supra*.) It likewise applies to the first phase of the third count (involving the efficacy of the Colusa Hemorrhoid Ointment). As to this latter phase, it should also be

pointed out that one of the Government's own "experts" (Dr. Tainter) admitted that the Colusa Hemorrhoid Ointment would have a palliative efficacy in treating the itching incident to hemorrhoids. (Tr. 55.)

As to the second phase of the third count (i.e., the omission of " $\frac{3}{4}$ oz." from the label on the jars of hemorrhoid ointment), our position is fully set forth in a subsequent portion of this brief. (See p. 59 *infra*.) Briefly stated, it is that this omission was entirely inadvertent and unintentional, and occurred through no fault of appellants, and hence did not constitute a crime.

II. THE TRIAL COURT COMMITTED HIGHLY PREJUDICIAL ERRORS IN CONNECTION WITH THE TESTIMONY OF DR. C. E. VON HOOVER, A VITAL DEFENSE WITNESS.

(A) Pertinent Assignments of Error.

Our argument under this major proposition is predicated upon Assignments of Error, Nos. XV, XVI, XVII, XVIII, XIX, and XX, which, because of their length, are printed in the Appendix. (see Appendix, pp. i to viii.) Briefly summarized, said assignments raise the point that the trial court improperly excluded testimony of this qualified pharmacologist directly pertaining to the issue as to the therapeutic efficacy of these Colusa products.

(B) The Facts as to Dr. C. E. Von Hoover, and the Court's Rulings Regarding His Testimony.

Dr. C. E. Von Hoover (Tr. 112-157), from San Antonio, Texas, was one of the most vital witnesses called by the defense. This gentleman, a highly trained pharmacologist, maintains a testing laboratory at San Antonio, Texas, for the purpose of clinically and otherwise testing drugs to determine their therapeutic efficacy. (Tr. 113.) This laboratory represents many national firms for which it does such clinical and laboratory testing of drug prepara-

tions. Among these are such noted firms as Bauer & Black of Chicago, Dermo Laboratories, Emerson Drug Company, Vitamin Research Company, N. C. Goodman Laboratories, and many other nationally known pharmaceutical houses. (Tr. 115.)

In 1942, appellants engaged the services of this laboratory for the purpose of conducting a series of clinical and laboratory tests *to determine the therapeutic efficacy of Colusa Natural Oil (and the other Colusa products) in the treatment of psoriasis and the other skin diseases involved in this case.* (Tr. 132.) Dr. Von Hoover and his clinical staff at this laboratory thereupon proceeded to make an extended series of tests to determine the worth and value of these Colusa products in the treatment of such skin diseases. In addition to other tests, hundreds of persons suffering from psoriasis and the other skin diseases involved in this case, including many patients from charity clinics, were clinically treated by Dr. Von Hoover and his associates with these Colusa products. Associated in these tests and in this laboratory with Dr. Von Hoover, were Dr. Beal, who is Assistant United States Surgeon and United States Public Health Officer in charge of immigration matters at San Antonio; also Dr. A. R. Burchelmann, an examiner and former Health Officer of San Antonio, and past trustee of the American Medical Society; also Major Burby, a veterinary and past trustee of the American Veterinary Association. The latter gentleman is the veterinary consultant for this laboratory.

These laboratory and clinical tests extended over a period of several months, and were concluded shortly prior to the commencement of the trial of this case.

At substantial expense, the defense brought Dr. Von Hoover to San Francisco to testify as a witness in order that he might give the court and jury the benefit of his extended scientific investigation made by him and his asso-

ciates as to the therapeutic efficacy of this Colusa Natural Oil.

Strangely enough, however, the lower court refused to permit this witness to do this. The Government's attorney objected to the proffered testimony of Dr. Von Hoover on the rather amazing ground that he was not qualified to testify *because he was not actually an M.D.* The following are illustrative excerpts, from the record in this case, which will demonstrate the unfair and improper restrictions placed by the trial court upon the testimony of this witness because he was not an M.D., viz.:

"Mr. Gleason. Q. And in the cases personally observed by you in these clinical tests, in any of these cases did you observe any unfavorable or injurious results from the use of Colusa Natural Oil on these patients?

"Mr. Zirpoli. Objected to as calling for an opinion and conclusion, your Honor, of this witness, who is not a physician and surgeon.

"Mr. Gleason. That is his business, if your Honor please, and profession; he tests drugs.

"The Court. The objection will be sustained.

"Mr. Acton. May we note an exception to that ruling." (Tr. 150-151.)

"Mr. Gleason. Did you see the Colusa Natural Oil applied to people who had psoriasis in this clinic?

"A. Yes.

"Mr. Zirpoli. Just a moment, I object to that. He is not competent to testify they had psoriasis.

"The Court. Objection sustained." (Tr. 121.)

We respectfully submit that the foregoing attitude and rulings of the trial court were manifestly erroneous. That these rulings were prejudicial, we respectfully submit, is too obvious to require much comment. However, so important is this matter to the defense that, before reviewing the law applicable thereto, we will set forth in greater detail the facts as to the qualifications of this highly trained pharmacologist.

1. *Dr. Von Hoover's qualifications and training as a pharmacologist.*

After his discharge from the American Army, at the termination of the last World War, Dr. Von Hoover studied bio-chemistry for eighteen months at New York City College. He then was awarded the Smedley D. Butler Scholarship and was sent to Kings College in London, where he studied for two years, from 1924 to 1926. At this institution, he studied pharmacology and general science, and received a degree of Master of Science from that college. (Tr. 113.) He then studied at the University of Vienna for two years, under the Smedley D. Butler Scholarship, receiving the degree of Doctor of Science, and also receiving his Ph.D. at Vienna, his courses there covering microbiology, laboratory, pharmacology and general science. He studied *materia medica* at the University of Vienna, *and studied the same courses* as an M.D. (Tr. 113), graduating from Vienna in 1929. In 1930, he organized this clinical testing agency at San Antonio, and has operated this agency ever since, representing many national firms, in pharmaceutical work.

Dr. Von Hoover also testified that in 1923, he worked for the N. C. Goodman Research Laboratory in New York, one of the largest manufacturing and research chemical houses in the United States (and one of his present clients); that he was with them for about a year; that he was part of the clinical staff, testing pharmaceuticals, externally and internally; that this work included analyses and testing of drugs to be used in the treatment of skin diseases. (Tr. 114.) He also testified that in the course of his practice as a pharmacologist, he had submitted various reports to, and testified before, the Federal Trade Commission, both as a witness for the Federal Trade Commission in labelling matters, and otherwise. Dr. Von Hoover also testified in detail as to the methods used by him and his associates in the clinical testing work carried on at his laboratory at San Antonio, including the so-called

animal therapy, which consists in trying out a given drug or preparation on animals, to determine its effectiveness as a germicide or otherwise. (Tr. 118.)

The witness further testified that he had had occasion in the course of his professional training at various colleges, and in the practice of his profession, to study the various skin diseases, and particularly psoriasis (Tr. 125); that he had studied dermatology; that he had had occasion to study the eczema family, of which there are forty types, and had studied varicose ulcers; that as a result of his training in dermatology and clinical testing work in his practice, he was familiar with these various diseases.

2. *Facts as to clinical tests made by Dr. Von Hoover and his associates of Colusa Natural Oil.*

After testifying at length as to his professional training and experience as a pharmacologist, Dr. Von Hoover then proceeded to describe the nature of the tests of Colusa Natural Oil made at his laboratory at San Antonio, Texas. We, counsel for the defense, experienced constant difficulty in trying to lay the foundation in connection with this testimony because the Government's counsel was repeatedly interrupting and objecting, on the score that this man was not competent to testify as to these matters *because he was not a physician and surgeon*. The following is one of the many illustrations of this position and attitude on the part of the Government, viz.:

"Yes, we made clinical tests in our laboratory and clinic of Colusa Natural Oil and Colusa Hemorrhoid Ointment.

"Q. Without going into details, I want to find out, first, what you did generally in order to test this remedy.

"Mr. Zirpoli. You will have to bring in the doctors that made the test. *You cannot take a man who is not a physician and surgeon*, and who is not competent.

"Mr. Gleason. This man's business is to test drugs."

* * * * *

"I made tests of Colusa Natural Oil as a pharmacologist and I have the reports. I also tested the oil on animals. I am not a veterinarian, but I am a graduate of veterinarian life science.

"Q. Did you test the oil on human beings?

"A. Yes.

"Q. First describe the tests that you made of this oil in its application to animals.

"Mr. Zirpoli. I object. He is not qualified to make an application of medication upon animals, or upon humans, and he is not qualified to treat animals or humans." (Tr. 117-118.)

Notwithstanding these and similar objections of the Government, we succeeded at least in having the doctor describe, in an interrupted and broken manner, the nature and extent of the tests made by himself and his associates in their laboratory and clinics at San Antonio. He testified that these clinical tests consisted of two distinct types, first, the so-called "animal therapy" (canine dermatology), and second, tests on human beings. In these latter clinical tests, the oil was applied to various and sundry human cases of psoriasis, athlete's foot, eczema, and the other skin diseases mentioned in the information in this case. He further testified that this clinical testing extended over a period of several months, beginning in April, 1942 and lasting until June 9, 1942; that he personally observed each and every case covered by these tests (Tr. 119) and was present in the clinic when this Colusa Oil was administered to the patients. (Tr. 132.) He further testified that at the completion of the investigation, he sat down and typed a complete report covering the results of these tests, and that this report was based on his own knowledge of the cases referred to; and that he had actually examined each of these cases on every one of the days on which the patient had appeared at the clinic. (Tr. 133.) These original reports prepared by Dr. Von Hoover were produced and marked for identification, and we sought, among other things, to use them for the purpose of refreshing the witness' recollection as to

the detailed facts observed by him in this clinical testing. (Tr. 147.)

The first report (Def. Ex. L for identification) consisted of a detailed report covering the so-called "canine dermatology" tests made by this witness and Dr. Burby, the veterinary, in testing Colusa Natural Oil on skin diseases of dogs. The witness identified this original report, and after the necessary foundational questions were propounded, was asked if it refreshed his recollection as to the facts observed by him in these clinical tests on animals, as to the therapeutic value and power of this Colusa Natural Oil in connection with such skin diseases on dogs. He said that it did (Tr. 147), and thereupon he was asked to state briefly the facts observed by him in these tests, after refreshing his recollection. Thereupon, the Government objected to this, as follows, viz.:

"Mr. Zirpoli. I want to make this objection, your Honor. He is asked to testify as to the effect of the application of this oil, *which calls for his opinion and conclusion as a veterinarian.*

"The Court. Objection sustained.

"Mr. Acton. Will your Honor allow us an exception to that ruling?

"The Court. Note an exception." (Tr. 147.)

The witness also identified another original report (Def. Ex. M for Identification) which he personally prepared, and which was a report of the clinical results of the use of this oil in physiological tests on human patients in one hundred cases involving the very skin diseases mentioned in the information. He testified that this report contained a statement of the facts observed by him in these clinical tests made by him and his associates on human beings, to ascertain the therapeutic value of Colusa Natural Oil in the treatment of psoriasis, athlete's foot, impetigo, varicose ulcers, hemorrhoids and poison oak and ivy. (Tr. 149.) He was prevented, however, from testifying on the basis of this memorandum because of a Government objection, based upon the claim, among other things, that he

was not competent to testify *because he was not a physician and surgeon.* (Tr. 150.)

Believing that Dr. Von Hoover, this highly trained pharmacologist who had made these extensive tests, was perhaps the best pharmacological authority in the United States as to the efficacy of these Colusa products, the defense also sought to have him give his opinion as to the effectiveness of these products in the treatment of psoriasis and the other skin diseases involved in this case. However, the court, by its rulings, repeatedly prevented such testimony, by sustaining the Government's objections that this man was not qualified to testify *because he was not a physician and surgeon.* The following rulings illustrate this situation, viz.:

"Mr. Gleason. Q. What is your opinion, Doctor, based upon the many tests made by you in your laboratory and in these clinics, and based upon your training as a pharmacologist, and based on your studies of the science of pharmacology, what is your opinion as to the efficacy of Colusa Oil in the treatment of psoriasis?"

"Mr. Zirpoli. I want to interpose an objection, your Honor.

"The Court. Objection sustained. Proceed.

"Mr. Gleason. Note an exception, if your Honor please.

"The Court. Let an exception be noted." (Tr. 128.)

"Yes, I observed the use of Colusa Natural Oil on a man named Mercurlin, who met a premature death. He was a deputy sheriff.

"Q. What skin disease did he have, Doctor?"

"Mr. Zirpoli. I object to that on the ground that this witness is not qualified to testify to that.

"The Court. Objection sustained.

"Mr. Gleason. Q. Do you know what disease he had?"

"Mr. Zirpoli. The same objection.

"The Court. The same ruling." (Tr. 127.)

"I remember Mrs. A. Nelly of San Antonio, Texas; she was a housewife, seventy years of age, who had a varicose ulcer.

"Mr. Zirpoli. I object to all of this testimony, first of all, as hearsay, as to her age, and his conclusion and opinion as to her having a varicose ulcer. He is not competent or qualified to testify to that. It may be the fact, but nevertheless, he is not the proper witness for it.

"Mr. Gleason. We submit, if the Court please, the statement that any man who has studied the *Materia Medica* and who has studied the diseases and taken the necessary and prescribed courses to obtain the degrees this man has, is competent to testify as to whether or not a given condition is a varicose ulcer, or eczema.

"The Court. I will allow him to answer with the hope we will get through soon.

"A. Mrs. A. Nelly is the varicose ulcer.

"The Court. How do you know?

"A. Well, from my experience, your Honor, in the laboratory, and as a doctor of science, and from the knowledge I have of *Materia Medica*, and dermatology and therapeutics, I determine that.

"The Court. By observation.

"A. By observation, yes sir.

"The Court. That is what you base your testimony on?

"A. That is what I base my testimony on, yes sir.

"The Court. All right, proceed.

"Mr. Gleason. May I have this picture marked next in order for identification?"

Thereupon the photograph was marked Defendants' Exhibit H for identification.

"Mr. Zirpoli. May I ask one other foundational question?

"The Court. You may.

"Mr. Zirpoli. You are not a pathologist, are you?

"A. No sir, I am not a pathologist.

"Mr. Zirpoli. Now I object to his conclusion as to the woman having a varicose ulcer on that further ground.

"The Court. I will sustain the objection and instruct the jury to disregard the testimony.

"Mr. Gleason. May we have an exception?

"The Court. You may have an exception." (Tr. 123-124.)

In other words, one minute the court decides to allow Dr. Von Hoover to testify on this subject and the very next, it reverses itself.

Further excerpts:

"Mr. Zirpoli. I object to his observation of the effect of a medication on a patient. He is not competent to testify to the effect of a medication on a patient.

"Mr. Acton. I don't like to argue after your Honor has ruled, but the law is, I think, your Honor, that a man may observe a person, and may know that a person is undergoing a certain type of medication, because he is undergoing it right in his own home, or in his laboratory.

"Mr. Gleason. Q. Did you see the Colusa Natural Oil applied to people who had psoriasis in this clinic?

"A. Yes.

"Mr. Zirpoli. Just a moment, I object to that. He is not competent to testify they had psoriasis.

"The Court. Objection sustained." (Tr. 121.)

"Q. Were any cases of psoriasis treated in that clinical testing laboratory?

"Mr. Zirpoli. I object to that; he is not competent to testify as to any cases of psoriasis, or their treatment.

"The Court. Objection sustained." (Tr. 125.)

It is apparent, we respectfully submit, from the foregoing, and from the various other rulings of the court in the course of this important witness' testimony, that to all intents and purposes, he was totally destroyed as a witness for the defense in this case.

Incidentally, the court took no pains to conceal from the jury the fact that it considered the testimony of this highly trained expert worthless. Before the defense had hardly begun their examination of this witness, the court admonished:

“Let us get through with this witness.” (Tr. 122.)

This attitude was repeated by the court:

“The Court. I am going to try to get through with this witness. He may answer it.” (Tr. 129.)

We shall now undertake to demonstrate that these objections of the Government and rulings of the trial court that this witness was not competent to testify as an expert because of the fact that he was not actually a licensed M.D. were manifestly erroneous and wholly without merit or legal foundation.

3. *The settled law as to testimony of expert witnesses.*

The law is well settled that *the only true test* as to the qualifications and competency of a person to testify as an expert on a given subject is whether or not his training and experience have been such as to give him a superior knowledge of the subject in question which the ordinary layman does not possess.

Rogers on Expert Testimony, 3rd Ed. 1941, well states this settled principle of law, viz.:

“In order to permit a witness to testify as an expert, it must appear that by study, practice, experience or observation he has acquired a knowledge of the particular subject inquired about beyond that of the ordinary person.” (p. 56.)

“The test to be applied in determining the competency of a witness to testify as an expert is implied in the definition of expert evidence. He must have acquired such special knowledge of the subject matter either by study of the recognized authorities on the subject or by practical experience, so that he can give the jury assistance and guidance in solving a problem

to which their equipment of good judgment and average knowledge is inadequate. If he can qualify under this test he may testify, otherwise not. The peculiar skill, knowledge or experience which qualifies one to testify as an expert is, as a general rule, that which has been acquired by the witness in his trade, profession or calling." (p. 69.)

"The basis of this type of expert testimony is the fact of peculiar knowledge or skill derived from experience in the particular matter in question." (p. 70.)

American Jurisprudence states the settled law on this subject in substantially the same way, and collects many of the host of cases exemplifying this rule. (See 20 *Am. Jurisprudence*, p. 656, § 783.) It also adds the following:

"Although a witness, in order to be competent as an expert, must show himself to be skilled or experienced in the business or profession to which the subject relates, there is no precise requirement as to the mode in which skill or experience shall have been acquired. Scientific study and training are not always essential to the competency of a witness as an expert. A witness may be competent to testify as an expert although his knowledge was acquired through the medium of practical experience rather than scientific study and research." (20 *Am. Jur.*, p. 657, § 784.)

In the recent case of *Farris v. Interstate Circuit* (C.C.A. 5—1941), 116 Fed. (2d) 409, 412, the court in ably summarizing the law as to "experts", stated:

"An expert is not permitted to state his opinion on a matter of common knowledge; nor can he give his opinion as to conclusions from facts within his special skill or knowledge when that opinion answers the precise question for determination by the jury."

"An expert is one who, by study or practical experience, has acquired a knowledge or skill or understanding of certain facts beyond that of the average man."

The following are a few of the many cases illustrating the application of the foregoing rules of law. We have endeavored to select a few cases involving testimony, as to bodily ailments, by experts who were not actually M.D.'s, viz.:

In *People v. Cox*, 340 Ill. 111, 172 N.E. 64, 66, 69 A.L.R. 1215, it was contended that the court erred in permitting a chemist to testify that the quantity of wood alcohol which he found in Easley's stomach was sufficient to cause death. On appeal the court stated,

"The objection is that the witness lacked the requisite qualifications to testify upon the subject and that a doctor of medicine should have been called for the purpose. The witness had made a special study of chemistry, had received the Master's and Doctor's degrees in that branch of learning and had been the head of the Department of Chemistry at the Bradley Institute at Peoria for twenty-eight years. *Although this witness was not a doctor of medicine*, he was clearly qualified to testify concerning the effects of a given quantity of wood alcohol in the human stomach upon human life." (Italics supplied.)

In *Dickey v. Western Tablet Co.*, 218 Mo. App. 253, 267 S.W. 431, 434, it was insisted that the court erred in permitting plaintiff's expert witness, Dr. Thomas, to testify that copper was infectious when it came in contact with wounds or abrasions of the skin, for the reason that the doctor was not qualified as an expert to give an opinion on the subject. This objection was based on the fact that Dr. Thomas was an analytical chemist and not a therapeutic chemist. He stated that he had studied therapeutic chemistry in a general way but had never practiced medicine. The court, on appeal, stated:

"We think that an analytical chemist with the experience in copper and other metals that this witness had, together with his general knowledge of therapeutic chemistry, made him competent as an expert witness in reference to the poisonous effect of copper."

In *Greengard v. Odorono Co.*, 256 N. Y. Supp. 708, the court ruled,

“The evidence of the chemist, Dr. Pozen, concerning the result of the application of certain chemicals in a solution to the human skin was admissible and was improperly excluded.”

Jones on Evidence, Vol. 3, page 2469, very effectively points out that the mere fact that a person is a *physician* does not necessarily qualify him to testify as an expert concerning poisons in the human system, viz.:

“Thus it is that chemists and physicians who are qualified by proper study and experience, may testify to the nature of poisons and their effect on the system and the symptoms which they produce. But the fact that the witness is a physician does not necessarily qualify him to testify as an expert concerning the presence of poisons in the human system, *since he may be wholly lacking in the requisite knowledge of chemical science.*” (Italics ours.)

In *Scott v. State*, 141 Ala. 1, it was claimed that the witness Ross, a chemist, was not qualified to testify because he was not a pathologist. On appeal, the court stated that it had been shown that Dr. Ross was a chemist and toxicologist of long standing, “by which is necessarily implied that he was acquainted with poisons and their effects and antidotes, and the effect of excessive doses of medicine. There is nothing in his testimony which was not properly received * * * *and this though he was not a druggist nor a pathologist.*” (Italics ours.)

In *Reynolds v. Davis*, 179 Atl. 613, 614, the question involved was as to whether or not a person who was a trained toxicologist could testify as to the effects of a solution of oxalic acid upon human beings. Like Dr. Von Hoover in our case, this toxicologist had studied *materia medica*. The court stated on appeal:

“In our judgment there was sufficient evidence to justify the trial justice in so ruling, especially in view of the fact, shown by the evidence, that the witness’ experience had covered the effect of oxalic acid upon

other human tissues, including the skin, and that the tissues of the human eye are soft and very sensitive.”

In *State v. Cook*, 17 Kan. 392, the question involved was whether or not a chemist who had made the analysis of the stomach of a decedent would be allowed to testify as an expert concerning the effect of strychnine on the human stomach and the human system, even though he was not a physician and surgeon. The court ruled:

“The effects of poison upon the human system comes within the scope of the science of toxicology.”

In *Thaggard v. Vapes*, 218 Ala. 609, 119 Sou. 647, the witness, Dr. Vapes, testified that he was a practicing dentist; that he was a graduate of a dental college, and in the study of his profession he had taken substantially the same course in chemistry, as to the effects of drugs on the human system, as is given to physicians; and that as a result of his study and practice he knew the effect of arsenic on the human body. The court in that case said:

“This, under the decisions of this court, qualified him to testify as an expert, leaving the weight of the testimony to the jury. (Citing cases.) Chemists and physicians who are qualified by study and experience may testify as to the nature of poison and its effects on the system.”

4. *Application of said rule of law to Dr. Von Hoover:*

It cannot be disputed, of course, that Dr. Von Hoover was and is a highly trained pharmacologist. The record plainly and indisputably shows his long training and experience in this field of science. In short, he not only has the requisite technical and scientific training, but likewise has had a vast practical experience in the pharmacological field. Nor can it be disputed that pharmacology is the very branch of medical science which treats of the very subject involved in the fundamental issues in this case, i.e., the therapeutic efficacy of drugs. Nor can it be denied that this witness and his associates made a most detailed and exhaustive study and clinical tests of the

products involved in this case, to determine their efficacy *in the treatment of the very diseases involved in this case.* We therefore respectfully submit that it is too clear for argument that the trial court plainly erred in excluding the testimony of this important witness. As a matter of fact, we believe that the very argument made by counsel for the Government in this case, and the testimony of the Government's own witnesses clearly demonstrate the incorrectness and unjustified nature of the court's rulings with respect to this eminent pharmacologist, viz.:

Early in this case, when the defense objected to the testimony of Dr. Maurice K. Tainter, a pharmacologist called by the Government, Government's counsel answered with an argument which we believe very aptly sums up the situation with respect to Dr. Von Hoover, viz.:

"Mr. Gleason. We object, if the court please, that no foundation has been laid. We would like to have the doctor state whether or not he ever applied the oil to such a condition. Have you ever applied that oil to a condition of poison oak?

"Mr. Zirpoli. I can cite innumerable cases under the Federal Food and Drug Act, your Honor, which provide that *when a man who is a scientist particularly learned in a particular field takes the stand, he is competent to testify about those matters for which he is specifically trained by reason of his learning and his instruction and his scientific training.*" (Tr. 57.)

Notwithstanding this argument of able counsel for the Government, made in presenting *his* case, he saw fit to later reverse his position and advance the palpably unsound contention that such a scientist could not testify unless it was first shown that he is duly admitted to the practice of medicine.

And in connection with the foregoing, it must be remembered that the science of pharmacology is, as is shown by the testimony of this same Dr. Tainter,

"* * * the subject dealing with drugs and medicines and their application to the treatment or cure of

disease; it can be expanded to include research, investigation of drugs, development of new drugs, the study of toxic effect of them, the treatment of poisoning and various related subjects of that sort.” (Tr. 50.)

In *Lutz v. Houck*, 263 N. Y. 116, 188 N. E. 274, the court also defines pharmacology, as follows:

“Pharmacology is the science that treats of drugs and medicines, their nature, preparation, administration and effects.”

We respectfully submit, therefore, that said rulings and attitude of the court with respect to this vital defense witness were plainly erroneous, and that the prejudicial nature of these rulings is likewise manifest.

Incidentally, it should be noted that the defense made every effort to convince the court of the erroneous nature of its rulings with respect to Dr. Von Hoover. (Tr. 131.)

III. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO ADMIT IN EVIDENCE THE TESTIMONIALS OFFERED BY THE DEFENSE.

(A) Pertinent Assignment of Error.

This phase of our argument is predicated upon Assignment of Error No. XXII (Tr. 353), which, because of its length, is printed in the Appendix. (See Appendix, p. viii.) This assignment asserts that the Court erred in refusing to admit in evidence the testimonials offered by the defense. (Exhibits Q and Q-1 for Identification, see Tr. 181-250.)

(B) These Testimonials Should Have Been Admitted in Evidence.

Hereinabove in our analysis of the information (see p. 9, *supra*), it is shown that the information purports to quote *certain statements* from the advertising matter of appellants. Then the information alleges that *these statements were false and misleading*.

Included in these *allegedly false statements*, thus quoted by the Government, is the statement:

“Colusa Natural Oil is credited by other users with producing relatively as remarkable results as above pictured in relieving irritation of external Acne, Eczema, Psoriasis,” etc.

In order to meet this charge, the defense sought to show the truth of this and various others of these said statements thus quoted in the information and alleged by the Government to be false and misleading; but was prevented by the court from so doing.

With respect to the above quoted statement (i.e., that other users had credited Colusa Natural Oil with various beneficial results, etc.), the defense sought to prove the truth of this by offering in evidence a large number of voluntary testimonials received by defendants from the users of these Colusa products. In other words, the defense sought to prove the *literal and complete truth of this very statement in their advertising matter*, which the Government attacked as *false and misleading*. Yet the court, by its rulings, absolutely prevented the defense from making any such proof, viz.:

“Mr. Gleason. You heard me read, Mr. Colgrove, a statement from the information in this case with respect to other users crediting various and sundry things, a statement contained in some of the advertising matter. Upon what did you base that statement?

“Mr. Zirpoli. Same objection, irrelevant, incompetent and immaterial.

“The Court. Objection sustained.

“Mr. Doyle. I desire an exception, if the Court please.” (Tr. 250-251.)

“Mr. Gleason. Q. In the information, Mr. Colgrove, there is a statement set forth, ‘Colusa Natural Oil is credited by other users with producing relatively as remarkable results as above pictured in relieving irritation of external acne, eczema, psoriasis, athlete’s foot or ringworm, poison ivy, varicose ulcers, burns and cuts.’ You have been marketing

this oil for approximately two or three years, as I recall your testimony. *Upon what did you base this statement that is contained in this information, the statement just read?*

“Mr. Zirpoli. I object, your Honor, it is irrelevant and immaterial as to what he based it on; *all that matters is the fact that the statement is there and the statement speaks for itself.*

“Mr. Gleason. In this information are various statements quoted from the advertising matter. Counsel has submitted to your Honor instructions, that we desire to argue, to the effect that if any false statement is contained in any portion of the advertising matter, the mats or otherwise, that this man can be convicted. We desire to show the truth of this statement. We desire to show that when Mr. Colgrove said that ‘Colusa Natural Oil is credited by other users’ he was telling the truth, and we desire to submit to your Honor hundreds of testimonials in regard to this product, received from users * * *

“The Court. Testimonials cannot go into evidence here.

“Mr. Gleason. I don’t want you to think I am going contrary to your ruling. I make the statement, I make it as an officer of this court, that I believe under this information, under settled principles of law——

“The Court. You may believe whatever you see fit.

“Mr. Gleason. May I present the law to your Honor on that subject?

“The Court. No, we will proceed. You may make your offer of proof, and you will have a record to protect you, and I will rule.” (Tr. 176-177.)

Counsel for defense then made an offer of proof (Tr. 178-179), which is set forth in the Appendix hereto. (See Appendix, p. ix.) The Government’s reply to this offer of proof is, we believe, quite interesting:

“Mr. Zirpoli. If I might respectfully submit, your Honor, as I have heretofore had occasion to state in arguing various points before the Court, that there was no element of fraud or bad faith involved; it is a

simple case of misbranding, and that therefore testimonials are not admissible in evidence. Had this been a fraud case, then the position taken by counsel would have been a proper one, but this is a misbranding case and not a case predicated upon fraud or fraudulent intent." (Tr. 179.)

In short, the Government concedes that if appellants had been accused of *fraud* in making these allegedly false statements in their advertising matter, these testimonials would clearly have been admissible.

Said argument of the Government wholly misses and sidesteps, we respectfully submit, the point that inasmuch as the Government saw fit to charge that appellants had made certain allegedly *false* statements, simple justice dictated that appellants have *the right to show the truth of such statements*. This, the court, by its said rulings, prevented. In other words, the defendants, while accused by the Government of making false statements to the public, are not to be permitted to prove the truth thereof! What a queer jurisprudence it would be which would permit such an anomalous procedure! Certainly, plain and elementary principles of justice require, under such circumstances, that the defendants be given the fullest opportunity to prove the truth of these statements alleged to be false.

Had the defense been permitted this opportunity, they would have, by the introduction of these testimonials, shown that when appellants stated in their advertising matter that other Colusa users had credited Colusa Oil with remarkable results, they stated *the literal truth*, viz.:

EXCERPTS FROM PROFFERED TESTIMONIALS.
(Def. Ex. Q-1 for Identification.)

"Much to my amazement it completely cured a skin disease I had had for over three years. * * * I went to the finest skin specialists in New York and have probably paid out several hundred dollars for x-ray

treatments and just about every sort of salve or lotion the human mind could conceive.”

Karl Pettit, New York City. (Tr. 182.)

“Find it the most beneficial product I’ve ever used.”

Mrs. J. C. Erkman, Duluth, Minn. (Tr. 187.)

“It worked like a miracle on my skin—all the red, rough skin disappeared in three days * * *”

Mrs. E. Rasmussen, Washington, D. C. (Tr. 193.)

“Your oil has practically cleared up a nasty case of eczema for me.”

Naomi Ford, Baltimore, Md. (Tr. 187.)

“Your product was marvelous. Now I am back to work as a masseuse in Hollywood. It will be a tough grind with those terrific doctor bills. Many people have been astonished because my leg ulcer finally healed.”

Miss E. Tuomala, Hollywood, Calif. (Tr. 206.)

“I just can’t find words to express my praise of this wonderful Oil and Capsules, as I had spent hundreds of dollars and no success as my leg just kept breaking out and itching; but with this first \$6.00 treatment all itching gone and healed entirely up.”

Steve Buckrom, Washington. (Tr. 217.)

“My hands for three years have come gradually to be like those described in the ‘Story of the Hands’. I used one-half a bottle of the oil and my hands cleared up in one week.”

Mrs. Ned Fortney, Kansas City, Mo. (Tr. 231.)

“I hardly know how to express my appreciation for such a remarkable remedy.”

Mrs. Hardin, Richmond, Va. (Tr. 196.)

“I never believed in magic before but do now.”

Miss Mary Doe, Higginsport, Ohio. (Tr. 240.)

“It is really remarkable. Thanks to your wonderful products, I now have a clear normal skin, and plan to be married in June. To all skin sufferers who really want relief I highly recommend your products. You shall be my friend for life.”

Miss Estell Hill, Arlington, Texas. (Tr. 245.)

“Surely a product of that sort should not be taken away from suffering humanity.”

F. O. Burekhardt, Seattle, Wash. (Tr. 197.)

Etc., etc., etc. (See Def. Ex. Q-1 for Ident., Tr. 181-249.)

The foregoing and the many other remarkable tributes contained in these testimonials, to the efficacy of these Colusa products, well demonstrate, we sincerely believe, the accuracy and truth of the aforementioned assertion in appellants' advertising matter, which the Government alleged to be false.

Furthermore, these testimonials, when considered in conjunction with various other undisputed facts, showed that the public was not misled by appellants' advertising matter. (See p. 76, *infra*.)

IV. THE THIRD COUNT IS DUPLICITOUS.

(A) Assignment of Error.

The pertinent Assignment of Error is No. VI, reading as follows:

“The Court erred in denying appellants' motion to compel the Government to elect as to which of the two separate alleged offenses set forth in Count Three it desired to submit to the jury; said count contained two distinct charges and the court should have compelled the Government to elect between these two. Said ruling was duly excepted to.” (Tr. 335.)

(B) Count Three Charges Two Separate and Distinct Offenses.

(1) The legal test as to duplicity.

Duplicity is:

“The joining in one count of two or more distinct offenses.”

Creel v. U. S. (C.C.A. 8), 21 Fed. (2d) 690.

It is an elementary rule of criminal pleading that a count which joins two or more distinct offenses is bad and vulnerable for duplicity.

31 *Corpus Juris*, § 321, p. 758;

State v. Smith, 61 Me. 386;

U. S. v. Blakeman, 251 Fed. 306;

U. S. v. American Naval Stores Co., 186 Fed. 592;

State v. Young (Mo. App.), 215 S. W. 499.

Ammerman v. U. S. (C.C.A. 8), 216 Fed. 326.

The early case of *State v. Smith*, supra, one of the leading authorities on duplicitous criminal pleadings, ably sums up the law on this subject, viz.:

“No rule of criminal pleading is better established than that which prohibits the joinder of two or more substantive offenses in the same count. A substantive offense is one which is complete of itself, and is not dependent on another. * * * The jury cannot find a verdict of guilty as to one part and not guilty as to another part of the same count. This strictness of pleading is necessary in order that the accused may not be in doubt as to the specific charge against which he is called upon to defend and that the court may know what sentence to pronounce. * * * When two or more independent offenses are joined in the same count it will be bad for duplicity. * * * The evidence might warrant a conviction upon one of the offenses charged, but not upon the others. But the jury cannot split up a count in one indictment and find the accused guilty of a part and not guilty of the balance; their verdict must be an entirety.”

In *U. S. v. American Naval Stores Co.*, supra, the court stated:

“It is elementary that two separate offenses cannot be included in one count of an indictment. Besides, it is important that the defendant should know whether the Government will proceed to prove that the defendants monopolized or attempted to monopolize. I think there is clearly a distinction between the two, and, although there is not any different punishment provided, the count is bad for duplicity and for lack of certainty.”

In *Ammerman v. U. S.*, supra, the Circuit Court of Appeals for the Eighth Circuit, in reversing (because of a duplicitous indictment) a conviction in the lower court, used language which aptly describes the dilemma which exists in our case because of the duplicitous third count, viz.:

“Perhaps no better illustration of the danger of permitting such an indictment to stand can be found than this case affords. The verdict of the jury finds the defendant guilty as charged in the indictment. Does this mean that the defendant was guilty of violating the Act of 1895 or the Act of 1897?”

State v. Young, supra, likewise effectively illustrates the vice and unfairness of a duplicitous count. The defendant was charged in one count of unlawfully practicing medicine, attempting to treat the sick, and advertising that he was authorized to treat the sick. A general verdict of conviction followed. The court instructed the jury they could find the defendant guilty if they believed the defendant did practice medicine, or did attempt to treat the sick, or did represent and advertise himself that he was permitted to practice medicine. The appellate court said (215 S. W. at 500):

“The statute provides for three separate and distinct offenses, and, the defendant in this case being charged with all three of the offenses, the verdict should have been specific as to whether he was guilty of one or the other or all of them. *As the matter was submitted to the jury, some of the jury may have believed him guilty of one of the offenses, and some of the other. The defendant is entitled to have twelve men believe him guilty of either one or all of the stated violations of the statute.*” (Italics ours.)

The foregoing authorities also show that the legal test as to whether one offense or more than one is embraced in a given information or indictment is whether or not the *same set of facts*, when proved, will suffice to support the various phases of the charge. In other words, if the count in question contains various phases, and proof of one

requires proof of facts not essential to the other phase, two offenses are charged and the count is bad for duplicity. (See also *Dimenza v. Johnston* (C.C.A. 9—1942), 130 Fed. (2d) 465.)

It is likewise well settled that:

“Duplicity is not a mere technical defect, but is one of substance and a judgment can and should be reversed if said element is present and properly objected to.” (*Creel v. U. S.*, supra.)

(2) Application of said legal principles to Count Three.

Applying said legal principles to Count Three, it is plain, we respectfully submit, that said count encompasses two wholly distinct and separate alleged offenses; the first (Tr. 10-11) being an alleged misrepresentation to the public as to the therapeutic efficacy of the Colusa Hemorrhoid Ointment; the second being simply a charge that a certain weight designation (i.e., “ $\frac{3}{4}$ ounce”) was omitted from the jar label.

Obviously, the proof of the second charge would not at all consist of facts sufficient to prove the first. To the contrary, proof of the second charge would simply require evidence to show that a certain jar of drug was shipped in interstate commerce with a label *not containing a weight designation*. Such proof (unless explained in some legitimate manner by the defense) would be sufficient to justify a conviction. Such proof, however, would have nothing to do with (and would not involve any proof as to) the efficacy or inefficacy of the drug contained in said jar.

Furthermore, the distinction between these two offenses encompassed by the third count has an important practical aspect which we are confident your Honors will readily recognize. The first charge, being one of misrepresentation to the public, is a serious one, directly affecting and involving appellants' business reputation and integrity. In short, a conviction on this charge is a very important matter to appellants.

On the other hand, the second phase of Count Three constitutes, at the most, a very technical alleged offense, one not at all involving any misrepresentation to the public. The mere fact that the weight designation, " $\frac{3}{4}$ ounce" was omitted from the label *would not mislead or fool the public at all*. In fact, the Federal Food, Drug and Cosmetic Act (Section 5026) provides that certain labels on small packages may be entirely exempted by the Secretary of Agriculture from this technical requirement of weight, etc. designation.

Now, a conviction under this confusing and dual third count leaves the entire matter in a muddled state. It is impossible to tell from such a result whether the defendants were convicted of the first and serious phase aforementioned (duping the public), or the second and technical phase aforementioned (label omission), or both. For example, let us assume that the jury were satisfied that, *as to the first phase*, appellants, because of their clear-cut and uncontradicted evidence as to the efficacy of Colusa Hemorrhoid Ointment in relieving the itching incident to hemorrhoids, were entitled to an acquittal, but, *as to the second phase*, were to be held culpable. How could the jury accomplish this under this Count Three?

Stating the matter a little differently, it is impossible to tell from the verdict of the jury in this case whether the jury intended to convict appellants under the first or second phase, or both. The settled rule as to duplicitous counts has for its purpose the prevention of just such anomalous situations.

The motion to elect is a proper method by which to attack a duplicitous count. (*Lemmon v. U. S.* (C.C.A. 8), 164 Fed. 953; 31 *Corpus Juris*, p. 790, § 360; *Pointer v. U. S.*, 151 U.S. 396, 145 S. Ct. 410.)

The defense duly moved, upon the completion of the evidence, to compel the Government to so elect (Tr. 274), and pointed out to the court at length the aforesaid legal considerations with respect to said count. This motion was denied, which ruling was duly excepted to.

V. THE TRIAL COURT COMMITTED VARIOUS OTHER PREJUDICIAL ERRORS IN THE TRIAL OF THIS CASE.

Under this heading, we will briefly argue various matters occurring at the trial of this case, which we submit fall within the category of prejudicial errors.

(A) Refusal to Permit Defense to Show that the Omission of Certain Quantitative Designations from the Label Involved in the Third Count Was Entirely Inadvertent.

Pertinent Assignment of Error: This point is based upon Assignment No. XXI. (Tr. 351; Appendix p. xii.) This assignment asserts that the court erred in preventing the defendants from introducing evidence to show that the omission of the weight designation on the label involved in the second phase of the third count was inadvertent and unintentional.

Argument: As shown above, the second phase of the third count charges defendants with a crime because the label on the jars of hemorrhoid ointment did not contain a designation of the weight of the contents of said jars (“ $\frac{3}{4}$ ounce”). To explain this omission, defendants sought to show that the omission of said weight designation was entirely inadvertent. To so demonstrate, appellants sought to prove, by competent evidence, that shortly prior to this shipment to New Mexico the supply of labels used on such jars became exhausted, and a new supply was ordered from McCoy Label Company, a reputable San Francisco label printing concern; that with this order, appellants submitted to said printing concern a “copy” of the desired label *containing the correct designation of the weight of the contents*, and instructed the printer to print the new labels in accordance with this “copy”; that due to a mistake of McCoy Label Company, this designation of quantity was omitted, and, due to this inadvertence, a few jars of ointment were sent out with such incomplete labels; and that shortly thereafter, this inadvertence was discovered and appellants immediately destroyed this large supply of labels and ordered an entire new supply with the correct designation of the weight upon them.

The defense sought to prove these facts by several different types of evidence. They sought to prove them by the testimony of a representative of McCoy Label Company, who was present in court and ready to testify as to all of the foregoing facts. Because of previous rulings of the court, and in the interests of time, the testimony of this witness was covered by stipulation. (Tr. 352-353.)

The defense also sought to prove these facts by the testimony of the defendant Colgrove (Tr. 168-175), but the court refused to permit such proof.

We also produced and offered in evidence the original letter sent by Mr. Colgrove to McCoy Label Company, constituting the actual order for these labels. The Government's objection to this was sustained, and the letter was marked as Defendants' Exhibit P for Identification. (Tr. 172-175.) In this letter, a specific instruction is set forth requesting the inclusion of the designation "contents $\frac{3}{4}$ oz." The previous jars (and labels) contained different weights, hence this specific instruction was sent by appellants to McCoy Label Company to cover this change in weight. (This letter is set forth in the Appendix, p. xxviii.)

The law as to criminal intent: In order to constitute an act as a crime, there must of course be a knowledge on the part of the accused that he is doing the forbidden act or, at least, such negligence on his part that the law will deem that he actually knew that he was doing the forbidden thing.

The general and well settled principle of law upon which we rely in this connection is stated in *Corpus Juris* as follows:

"General Rule. Where one in ignorance or mistake as to fact commits an act which but for such mistake would be a crime, there is an absence of the malice or criminal intention which is generally an essential element of crime, and the general rule therefore is that such ignorance or *mistake of fact* will exempt one from criminal responsibility, provided always there is

no such fault or negligence on his part as supplies the element of criminal intent.” (16 *Corpus Juris*, Sec. 53, p. 85, and cases therein cited.) (*Italics ours.*)

We submit, therefore, that the defendants should have been permitted to show that this label omission was entirely inadvertent and through no fault of theirs, and that the label in question was sent out inadvertently and in ignorance of the true facts.

(B) The Court Erred in Refusing to Permit Appellants to Prove the Truth of Certain Statements Which the Government Attacked as False.

Pertinent Assignment of Error: This point is predicated upon Assignment No. XXIV. (Tr. 359; Appendix p. xiii.) This assignment asserts 'that the court erred in refusing to permit the defendants to show the truth of a certain statement made in their advertising matter and alleged to be false.

Argument: Among the various statements quoted in the information and alleged to be false was a certain statement regarding radium emanations, viz.:

“Radium emanation is accepted as harmoniously in the body as is sunlight by the withering plant.”

“The emanation is taken up in the blood and as quick as lightning, goes to all parts of the body where it kills or checks the disease germs.”

The information was unfair to appellants in this connection, because the actual statement contained in the newspaper mat was and is:

“This Colusa product carries about 4% of Iodine * * * nitrogen gas and radium emanations—but NO RADIUM. *Science papers by eminent physicians state that, ‘Radium emanation is accepted as harmoniously in the body as is sunlight by the withering plant, etc.’*” (Tr. 27.)

The Government omitted in the information the portion italicized in the foregoing quotation.

In other words, appellants did *not* compose these statements as to the effect of radium emanations, or insert them in this advertising matter as *their* statements. They simply stated that: "Science papers by eminent physicians state that, etc."

Yet, when appellants sought to prove the source of these statements and sought to show that eminent scientific authorities had so stated, the court and Government blocked such proof, viz.:

(The witness Colgrove):

"I did not compose the statement, 'The emanation is taken up in the blood and as quick as lightning goes to all parts of the body where it kills or checks the disease germs.' Nor did I compose this statement, 'Science papers by eminent physicians state that' followed by quotation. I copied them from a source I relied on as being authoritative. I have a copy of those quotations with me." (Tr. 162.)

"Mr. Gleason. Do you have available, Mr. Colgrove, the statement upon the basis of which these statements were incorporated in the newspaper mat with respect to the efficacy of radium through the body. Can you give counsel the authorities from which that was procured?

"A. Yes, sir.

"Mr. Zirpoli. I object to that. Authorities as given by this witness are irrelevant and immaterial.

"Mr. Doyle. May he answer the question, if your Honor please?

"The Court. What question?

"Mr. Doyle. The question as to the source from which he obtained this statement which appears quoted in the mat. It appears as quoted.

"The Court. It matters very little the source of the information or where it came from. We are not concerned with the source of it.

"Mr. Doyle. Exception, if your Honor please." (Tr. 251-252.)

Certainly, we respectfully submit, common justice demands and requires that appellants be given a chance to

prove the accuracy and truth of this statement which the Government claims to be false.

Another instance of this very same type of ruling is covered by Assignment No. XXXIV (Tr. 371; Appendix p. xiv) which covers the following. One of the statements quoted in the information from appellants' advertising matter (and alleged to be false) was the statement that in order to secure one gallon of this medicinal oil it is necessary to pump thousands of gallons of water. (Tr. 6.) Yet, when the defense sought to prove the truth of this statement by testimony of a very competent witness who actually had operated these wells and had been in charge of such operations for several years, the court and Government precluded such proof. (Tr. 160.)

(C) The Court Erred in Permitting the Government to Interrogate Dr. Tainter on Certain Subjects Without Any Proper Foundation Having Been Laid.

Pertinent Assignment of Error: This point is predicated upon Assignment No. XXXI. (Tr. 367; Appendix p. xv.) The assignment asserts that the court erred in permitting Dr. Tainter to testify as to the effect of the application of Colusa Oil in poison oak cases.

Argument: We have hereinabove shown that the question as to the efficacy of this oil in the treatment of poison oak and other skin afflictions was the fundamental issue in this case. We have likewise shown how narrowly the court restricted the examination and testimony of Dr. Von Hoover, a scientist who had made very careful and exhaustive clinical and laboratory tests of this oil.

We find, however, that the court permitted the Government great latitude in asking its so-called experts for testimony on this vital issue. For example, Dr. Tainter was permitted to testify as to the effect of the application of this oil in poison ivy, without the slightest foundation first having been laid to show that he had made any such test, viz.:

“Poison Ivy is a burning of the skin by means of an oil secreted by the poison ivy or poison oak plants. The oil gets on the skin from contact with the plants out in nature, in the fields or in the woods, and then produces itching and burning and blistering, depending on the degree of the contact that occurs.

“Mr. Zirpoli. What is the effect of the application of oil such as the oil here on the skin?

“Mr. Gleason. We object, if the court please, that no foundation has been laid. We would like to have the doctor state whether or not he ever applied the oil to such a condition. Have you ever applied that oil to a condition of poison oak?

“Mr. Zirpoli. I can cite innumerable cases under the Federal Food and Drug Act, your Honor, which provide that when a man who is a scientist particularly learned in a particular field takes the stand, he is competent to testify about those matters for which he is specifically trained by reason of his learning and his instruction and his scientific training; and furthermore, there are innumerable cases that say that the particular doctor need not even have applied the particular product involved or have used or seen it if he knows its constituent, component parts and has been given the necessary foundation therefor. And that has been done, because we have told the doctor what this stuff consists of, and the doctor himself has seen it, and from his scientific medical knowledge he can give his opinion as to what the effect would be.

“Mr. Gleason. If the Court please, we doubt very seriously whether counsel can produce any case covering testimony of this type. We would like to ask one question, if we may, for foundational purposes, and that question will be whether or not the doctor has ever applied oil of this type to that kind of a disease.

“The Court. The Court is prepared to rule.

“Mr. Zirpoli. That is cross-examination.

“The Court. The Court is prepared to rule. You may develop that on cross-examination. The objection will be overruled.

“Mr. Acton. Will your Honor allow us an exception?

“The Court. Yes.” (Tr. 56-58.)

We are confident that it takes no extended argument on our part to convince this Honorable Court of the fact that when it comes to oils and hydrocarbons, a most intricate and complicated chemical family (or families) is present. The record (including testimony of the Government's own witnesses) plainly shows this. As Webster tersely sums up the situation, "Petroleum consists of a complex mixture of various hydrocarbons, and varies much in appearance, composition, and properties". A reference to Webster's New International Dictionary and the tables therein contained as to the various general groups of products obtained by the fractional distillation of petroleum will indicate the extreme complexity of the chemistry encompassed by the simple word "petroleum". The hydrocarbons literally have thousands upon thousands of chemical ramifications. From this myriad of molecular arrangements which we know as oils (hydrocarbons) issue such seemingly dissimilar things (to mention but a few) as rubber, dyes, gasoline, medicinal oil and the wonderful sulfa drugs. As the Government witness Buell admitted on cross-examination, the hydrocarbon symbol, C_2H_5OH , stands for sixty-four varieties of compounds found in petroleum oil. (Tr. 29.)

Bearing in mind this highly complicated nature of petroleum, it was, we respectfully submit, highly prejudicial for the court to permit this witness to testify as to the effect of this particular oil (i.e., the very issue in this case) without so much as a showing that the witness has the necessary *knowledge* of the particular oil in question to enable him to testify.

The authorities cited hereinabove with respect to the use of so-called "expert testimony" all are in accord on the point that before an "expert" can testify with respect to a given subject, a foundation must be laid to show that such "expert" is qualified, *by virtue of proper study of that very subject*, to express an opinion with respect thereto. After all, the law should not and does not permit

a man's liberty and honor to be jeopardized by a guessing game by so-called "experts"!

(D) The Court Erred in Permitting the Witness Dr. Tainter to Testify as to This Oil Being an Ordinary Crude Oil.

Pertinent Assignment of Error: This point is covered by Assignment No. XXVIII (Tr. 364; Appendix p. xvi), which assignment asserts that the court erred in permitting the Government to ask Dr. Tainter to compare Colusa Natural Oil with "ordinary crude petroleum" without laying a proper foundation to show that Dr. Tainter was qualified to make such a comparison.

Argument: The following excerpt from the record illustrates this particular phase:

"Mr. Zirpoli. Q. Doctor, from your examination of this product, was it any different, from your own experience from ordinary crude petroleum oil?

"Mr. Gleason. Just a moment. If the court please, we object to that on the ground that it is incompetent, irrelevant and immaterial; that no proper foundation has been laid. And we stress this objection, if the court please, for the reason, as has already been brought out, there are thousands of different types of crude oils with thousands of different constituents, and for a blanket assertion to be made of this type is utterly unfair. If the court please, we submit this: if the doctor wants to testify as to the crude oils that he has had experience with, he should give us the formulas and the designations, paraffine, asphalt or otherwise, and then compare this oil with them. Then we have some facts.

"The Court. The court is prepared to rule.

"Mr. Acton. Will your Honor allow us an exception before the answer?

"The Court. Note an exception." (Tr. 53.)

For the same reasons which we have argued immediately hereinabove under Point (C), this ruling of the court was, we respectfully submit, erroneous and prejudicial.

It might be added that there was no proper foundational proof to show that Dr. Tainter was a petroleum engineer,

or had any such special training or experience in the science of petroleum as would qualify him to testify on such a comprehensive and complicated matter as that embraced in and by said objectionable question aforementioned.

Again we cannot help but note the very different attitude of the court in giving, on the one hand, this so-called expert the widest latitude and free rein in hypothetically expressing his opinions (guesses) on the very issues in this case and as to which he had made no scientific tests whatsoever; and, on the other hand, refusing Dr. Von Hoover, a fully qualified scientist, to even begin to relate the *facts* observed by him in his careful and exhaustive scientific tests, let alone express his opinions based thereon.

(E) The Unfair Attitude of the Trial Court Towards Appellants.

We approach this section of our brief with a most profound respect for Judge Roche, the trial judge. Perhaps it might come as a shock to so much as suggest that Judge Roche, of all judges, could be found wanting in seeing that these appellants received anything but the fullest and fairest consideration in his courtroom. We regret to say, however, that it is our sincere conviction, as officers of this court, that he did not.

That something which may best be characterized as the undefinable impressions of the trial persuade us who write this brief that the trial judge manifested a deep rooted opposition (unconsciously perhaps) to anything sold to a person suffering or afflicted with disease that had not been prescribed by a physician; and that this deep seated feeling translated itself into an obvious antipathy towards appellants which must have become manifest to the jury.

We have shown hereinabove that the trial court permitted the Government great latitude in presenting its so-called "expert" testimony. It permitted the Government's doctors to express opinions as to the efficacy of these Colusa products without the slightest showing that they had used them or tried them in any way. Likewise,

it permitted the Government to indulge in lengthy cross-examinations on wholly irrelevant matters. (See p. 70, *infra*.)

One would naturally expect that the court would permit similar latitude in the presentation of the defense case, particularly where, as here, no charge of fraud or bad faith was involved. One would all the more expect this in view of the fact that the Government's own witnesses admitted that the medical profession knows no cure for psoriasis, and various other of these skin diseases. Under these circumstances, one would expect that the court would be only too ready and anxious to permit the introduction of any and all evidence which the defense could produce bearing upon the efficacy of these Colusa products in the treatment of these horrible skin diseases.

Yet, we find the opposite. Not only did the court erroneously and unduly restrict the defense proof (as shown in previous portions of this brief), but the court likewise made it very manifest to the jury, during the presentation of the defense case, that the court wanted to get through with our side of the case. For example, when Dr. Vincent, the able and elderly Texas physician (p. 20, *supra*), was testifying as a defense witness, the court stated, "Proceed. Let's get through with this case." (Tr. 99.) We had hardly completed our qualification of Dr. Von Hoover as an expert pharmacologist when the court stated, in ruling on an objection, "Let us get through with this witness." (Tr. 122.) A few minutes later, the court stated, with respect to the same witness, "I will allow him to answer with the hope we will get through soon." (Tr. 123.) A little later, in the course of the testimony of this vital defense witness, "The Court: I am going to try to get through with this witness." (Tr. 129.)

Mr. Colgrove, one of the defendants, had hardly been seated in the witness chair when the Court, in interrupting a short preliminary statement by the witness as to how he became interested in this oil project, stated quite sharply, "We are not concerned here with what you are interested

in.” (Tr. 161.) A few minutes later, “The Court: Let’s get through with this witness.” (Tr. 165.)

Yet we find, on the other hand, that the court permitted the Government, over the strenuous and repeated objection of the defense, to cross-examine this same witness on many wholly and palpably irrelevant matters which have not the slightest bearing on the issues in this case. (See p. 70, *infra*.)

Other similar incidents could be multiplied to show the attitude manifested by the trial court towards the defense case. We will cite but one more. Mr. A. W. Scott, a welder, testifying as a defense witness, was telling about the efficacy of Colusa Oil in treating severe burns. An objection was made by the Government to a certain question propounded to him early in his examination, and the court, instead of ruling, stated, “Is that all from this witness?” (Tr. 159.)

In our sincere and humble opinion, the foregoing and other similar remarks made by the trial court during the presentation of the defense case, clearly and definitely conveyed to the jury the idea that the court considered our case to be deserving of little consideration. Such remarks, for all practical purposes, had the effect of largely destroying the value of these witnesses to the defense.

The Federal appellate courts have on many occasions pointed out the tremendously important part which the remarks of a trial judge may have upon a jury. As the Supreme Court (speaking through Justice Hughes) stated in *Quercia v. U. S.*:

“The influence of the trial judge on the jury ‘is necessarily and properly of great weight’ and ‘his lightest word or intimation is received with deference, and may prove controlling’. This court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence ‘should be so given as not to mislead, and especially that it should not be one-sided.’” (289 U. S. 466, at 470.)

The Circuit Court of Appeals for the Seventh Circuit well explained the true function of a trial judge in the following language:

“While he has the right to ask questions of witnesses in order to ascertain the facts and elicit the truth as to points in issue, he must not forget the functions of the judge and assume that of the advocate, lest he give the jury the impression that he favors one side or the other, and the extent to which he participates in the examination of a witness must depend largely upon the circumstances of the particular case and the conditions which arise during the trial. *He should also be ever mindful that one of the most important essentials to the performance of the exalted task of upholding the majesty of the law is dignity and decorum.*” (*U. S. v. Lee* (C.C.A. 7), 107 Fed. (2d) 522, at 529.) (Italics supplied.)

Certainly, we respectfully submit, the kinetical and abrupt attitude manifested by the trial court in this case towards appellants, whose business has been that of bringing relief and comfort to thousands of people suffering from these horrible skin afflictions, was not conducive to the fair trial to which these appellants were entitled.

(F) The Court Erred in Permitting the Government to Cross-examine Defendants at Length on Wholly Immaterial Matters.

Pertinent Assignment of Error: This point is predicated upon Assignment No. XXV (Tr. 361; Appendix p. xviii) and Assignment No. XXVI. (Tr. 361; Appendix p. xviii.) These assignments assert that the court erred in permitting the Government to pursue an extended cross-examination of the defendant Colgrove on matters wholly irrelevant to the issues involved in this case.

Argument: While the Government contended, on the one hand, that the bad faith (or good faith) of the defendants was not in issue (and thereby blocked much of the defense proof), the Government sought (and received) a wide latitude when it came to the conduct of its cross-

examination. For example, the court, over repeated objections of the defense, permitted the Government to go into a lengthy examination as to Mr. Colgrove's past business activities (Tr. 254; Assignment No. XXV, Appendix p. xviii), *matters which had absolutely no bearing whatsoever upon the issues in this case*, if the issues were as defined by Government's counsel in his earlier objections to defense evidence.

"Q. In 1930, did you continue the operation of the insurance business in the State of Illinois?

"Mr. Gleason. We object to that on the ground that it is incompetent, irrelevant and immaterial, and has nothing to do with the issues in this case.

"The Court. Objection overruled.

"Mr. Gleason. May we have an exception?

"The Court. Note an exception.

"A. Yes, sir.

"It was here stipulated that defendants' objections would run to this line of questioning with exceptions reserved." (Tr. 253.)

Another example of this is the lengthy examination of Mr. Colgrove concerning a wholly immaterial matter, the so-called Dr. Woodman testimonial letter. (Tr. 254-256; Assignment No. XXVI, Appendix p. xviii.) In overruling the defense objection on this phase, the court in effect told the jury they could consider this wholly immaterial matter, while at the same time the court would permit the jury to receive nothing which tended to prove the good faith of the defendants, viz.:

"Mr. Gleason. We object to that on the ground that it is utterly incompetent, irrelevant and immaterial. What bearing has that on this case?

"The Court. That is a matter entirely for the jury. Let the jury determine." (Tr. 255.)

The purpose of the Government in connection with this Woodman letter was and is, of course, quite obvious. By this wholly inconsequential matter, the Government's counsel sought to lead the jury to believe that Mr. Colgrove had acted in bad faith in connection with said

letter. And yet the Government had, a short time previously, in the direct examination of this very witness, emphatically and successfully contended that the element of good faith or bad faith was not at all involved.

(G) The Court Erred in Refusing to Permit Appellants to Prove Various Facts to Show Their Good Faith.

Pertinent Assignment of Error: This point is predicated upon Assignment No. XXVII. (Tr. 363; Appendix p. xix.) This assignment contends that the court erred in preventing defendants from showing that in distributing their products to the public, they did so in an ethical and honest manner.

Argument: The defendants sought to prove that they, in conducting their business of distributing these products of skin sufferers, conducted it on an honest and ethical basis, and tried in every way to be fair and just to the public. As evidence of their good faith, they sought to show various things. For example, they sought to prove that in distributing these products they at times used a "gratitude price offer", that is, they offered to, and did, mail these products to skin sufferers on a basis whereby these people paid nothing for the products unless and until they had first used them, after which they paid according to their "gratitude". In other words, if they did not desire to pay, they did not have to do so. The court refused to permit proof of this practice. (Tr. 162.)

Likewise, defendants sought to show that they made a practice of distributing the oil free of charge to hospitals and to doctors, and also to any person who wanted to use it, if such person was not in a position to pay for it. The court likewise refused to permit any such proof. (Tr. 167.) The Government repeatedly and successfully objected to proof of any such facts, by contending that the good faith of the defendants was not at all involved in the case.

This case is, of course, a criminal proceeding. We submit that it should be, and is, the right of every defendant charged with misrepresentation to the public to prove any

and all facts showing or tending to show that in dealing with the public, and in doing the things which are impugned by the Government, they acted in good faith. The jury should be entitled to consider any and all such facts in order to arrive at its conclusion as to whether in truth and in fact the defendants did misrepresent to the public in their dealings with the public.

(H) The Court Erred in Refusing to Permit Mr. Everett, a Defense Witness, to Testify as to the Physical Condition of Another Person Who Had Used These Colusa Products.

Pertinent Assignment of Error: This point is based on Assignment No. XXXII (Tr. 369; Appendix p. xx), which asserts that the court erred in refusing to permit a defense witness to testify as to the physical condition of another person who used these Colusa products.

Argument: Mr. Everett, a defense witness (Tr. 93-96), after relating his successful use of the Colusa Hemorrhoid Ointment in treating his own case of hemorrhoids, was then interrogated concerning another person, a friend, who had used these Colusa products. We first sought to bring out the fact that this person was ill, viz.:

“The Witness. A. Why, he was ill.

“Mr. Zirpoli. Your Honor, that very statement is a conclusion; that he was ill calls for a conclusion; that is not a physical description. I ask that that be stricken from the record.

“The Court. It may go out.

“The Witness. He was thin, depressed.

“Mr. Zirpoli. I ask that the conclusion that he was depressed go out; that obviously is not a conclusion that a person can make.

“The Court. It may go out.” (Tr. 95.)

Another example of this occurred in the testimony of Mr. Colgrove in connection with his testimony as to the case of Baumgartner, the so-called “hands” case referred to in appellants’ advertising matter.

“Mr. Gleason. Q. Did he appear at that time to be in the same mental condition as he appeared on the first occasion when you met him?

“Mr. Zirpoli. I object to that as calling for the conclusion of this witness as to whether he was in the same mental condition.

“The Court. The objection will be sustained. Let it go out and let the jury disregard it. He may state what he observed.

“Mr. Gleason. If the court please, may I, with the permission of the court, call attention to a settled rule of law to the effect—I have the authorities and the books here—that any lay witness may give an opinion as to mental condition, as to anguish, torment, joy, happiness.

“The Court. He may state what he observed. Let the jury determine it.

“Mr. Gleason. I would like to ask the witness for his opinion, if the Court please, under the well settled rule of law which I have.

“Mr. Zirpoli. I object to that if it calls for a conclusion.” (Tr. 163-164.)

The law as to such conclusions: It is a well settled rule of evidence that a witness has the right to give his *conclusions* as to the appearance (mental or physical) of another person, viz.:

“Thus a witness may be allowed to state that a person appeared to be, or impressed him as being, affectionate; that one was afraid, frightened, or scared; that a person was agitated, confused, excited, incoherent, nervous or surprised; or on the other hand, calm, quiet, or rational; that a person was angry, cross, enraged, or mad; that one was anxious, *apprehensive*, distressed or *worried*; that one was bitter; that one was contented, or pleased; or on the other hand, disgusted, or hurt; that a person was despondent, or the reverse; that one was feeling pretty bad, that one was friendly, or hostile; that one was interested, or indifferent; that one was jesting or in earnest; or that a person was joyous, or sad. A witness has also been permitted to characterize a state of mind as natural, or as related in a particular way to that of another person; and to state that a person appeared to be listening; that he *exhibited such emotions as anguish*, attachment, ferocity, or *grief*, or that he exhibited no sorrow. Statements

have been received that one's bearing was truculent, overbearing, or insolent; or that he had a sneer on his face; that one's disposition was bright and cheerful; that one impressed the witness as happy and contented; and that one was in his usual frame of mind. A witness has also been allowed to state the existence of more complicated mental states, as belief, intention, knowledge, or the operation of undue or other influence. A change in habitual mental attitude may also be stated." (22 *Corpus Juris*, pp. 614-616, and the host of cases therein cited.) (Italics ours.)

"* * * an ordinary observer who has had suitable opportunity for observation may state the apparent physical condition of another person, or testify as to what are more distinctly inferences from animate bodily phenomena, as the existence of a state of apparent health, or, on the other hand, the existence of a state of apparent sickness or disease, as that a person had fever, or was ruptured, or paralyzed. Such an observer may also state a change in apparent condition, whether the change is from sickness to health, or from health to sickness, or from bad to worse, or from worse to better." (22 *Corpus Juris*, p. 618, § 711, and the many cases cited therein.)

One of the host of cases illustrating said rule of law giving lay witnesses the right to express their opinions or conclusions as to the mental or physical condition or suffering of another is *Kimball v. Northern Electric Co.*, 159 Cal. 225, at 231, viz.:

"The admission of testimony of respondent's nurse upon the extent of his suffering was not erroneous. Such testimony is competent and does not require expert qualifications in the person giving it. In *Kline v. Santa Barbara etc. Ry. Co.*, 150 Cal. 750 (90 Pac. 129), the following language was used: 'It does not require an expert to tell whether a person suffers. The appearance of a person who suffers severely is sufficient to manifest his condition to any one of ordinary intelligence and experience. These witnesses had all observed her, had heard her groans and complaints, and were competent to give an opinion as to her suffering.' This so clearly answers appellant's objection that further comment is unnecessary."

It is likewise well settled that such a witness may testify as to whether a person appeared to be in the same mental condition at one time as he did at another, viz.:

“A witness may state a change in mental condition, whether such change is for the better or for the worse, or may state that there has been no change in mental condition.” (22 *Corpus Juris*, p. 604, § 697, and authorities cited.)

(I) The Court Erred in Refusing to Permit Appellants to Prove Certain Facts to Show that the Public Was Not Misled by Appellants' Advertising Matter, Attacked by the Government as False and Misleading.

Pertinent Assignment of Error: This point is based upon Assignment No. XXIII (Tr. 358; Appendix p. xxi), which contends that the court erred in preventing defendants from proving certain facts as to their dealings with the public in the sale and distribution of these Colusa products, to show that the public was not misled.

Argument: As shown hereinabove, the information charges that appellants' advertising matter was *false and misleading*. This, of course, meant false and misleading to the public.

To refute this charge, appellants sought (in addition to showing, by the aforementioned concrete and undisputed “case” evidence from actual users, that these Colusa products were efficacious in the treatment of these skin diseases) to also show that in truth and in fact the public had not been misled or duped, but, to the contrary, had been treated in a fair and honest manner. To demonstrate this, appellants sought to prove various facts which may be briefly summed up as follows: That in the course of this business, during the past three years, many thousands of persons have purchased these Colusa products; that all such sales were made under a rigid money-back guarantee completely protecting the purchaser in the event that these products did not live up to the description thereof contained in the advertising matter; that of these many thousands of purchasers, *less than two per cent* availed

themselves of this unconditional guarantee; that many hundreds of these people, instead of asserting or claiming that they had been misled, sat down and voluntarily (and wholly without any solicitation from appellants) sent to this company testimonials praising these Colusa products, and stating how completely they were satisfied therewith.

The court repeatedly prevented any such proof. The following excerpt, set forth in the above mentioned assignment, indicates how completely and quickly the court disposed of this line of proof:

“Mr. Gleason. Q. Mr. Colgrove, in the course of your marketing of this product, can you tell us the number of sales that have been made of this product to people throughout the United States?

“A. Many thousands of them.

“Q. You sold your product on a money-back guarantee, did you not?

“A. Yes.

“Q. Can you tell us how many of the people to whom you sold this product throughout the United States availed themselves of the opportunity to receive their money back?

“Mr. Zirpoli. I object to that as irrelevant and immaterial, and a form of negative proof. I object to it.

“The Court. The objection will be sustained. We are not here concerned with any money-back guarantees. There is no issue involved in this case about money or money back for any sales. Let us proceed.”
(Tr. 177-178.)

Finally, defense counsel made a lengthy offer of proof summarizing the various facts which they sought to prove (Tr. 178-180) and which are briefly summarized above. The court sustained the Government's objection to this offer, as it had previously done in connection with the defense effort to introduce evidence covering these various facts.

Proof of all of said facts was, we respectfully submit, proper and should have been permitted, because all of said

facts, when taken together, would have refuted or tended to refute any claim or contention that the advertising matter of appellants was misleading to the public. What better proof could there be on the issue as to whether or not the public had, in fact, been misled by appellants' advertising, than the public's own reaction thereto!

Certainly, we respectfully submit, these facts above recited would, under simple principles of logic, bear upon said fundamental issue as to whether or not the public was misled. In the last analysis, the test of relevancy in our modern jurisprudence is, of course, logic.

"Logic is the controlling force in the modern law of evidence * * * It is therefore a basic rule of evidence that whatever facts are logically relevant are legally admissible, while facts which are not logically relevant to the issue are not admissible; the onus of showing the relevancy, intrinsic or in connection with other facts, of a fact offered in evidence being upon the party offering the evidence." (22 *Corpus Juris*, p. 158, § 89.)

The Supreme Court of the United States enunciated this fundamental in *Standard Oil Co. v. Van Etten*, 107 U. S. 325, viz.:

"Whatever naturally and logically tends to establish it (i.e., the fact in question), is competent evidence." (At p. 332.)

Incidentally, the Government's objection that this evidence was inadmissible because it was a "form of negative proof" was, we respectfully submit, without merit. It is well settled that "negative evidence" is competent and proper. (22 *Corpus Juris*, p. 168, § 94, and the many authorities therein cited.)

The following are a few of the many cases in which courts, under a variety of circumstances, have approved the use of "negative evidence or proof", viz.:

Steil v. Holland (C.C.A. 9), 3 Fed. (2d) 776;

Norfolk Southern R. Co. v. Stricklin (D.C.-N.C.), 264 Fed. 546;

Fels v. East St. Louis & S. Ry. Co. (C.C.A. 8), 275 Fed. 881;

Ill. Central Co. v. Sigler (C.C.A. 6), 122 Fed. (2d) 279;

Wheeler v. Fidelity & Casualty Co., 298 Mo. 619, 251 S. W. 924;

Exposita v. United Railroads, 42 Cal. App. 320, 183 Pac. 576;

Thuet v. Southern Pacific Co., 135 Cal. App. 527;

Nall v. Brennan (Mo.), 23 S. W. (2d) 1053.

In *Steil v. Holland*, supra, this Honorable Court (Hunt, J.) stated the following with respect to certain "negative evidence" similar in purpose to that sought to be introduced by us (i.e., to show absence of complaints, etc.):

"However, the question of practice need not be dwelt upon, because there was direct testimony by plaintiffs below to the effect that they had sold goods of the same 'range' to other tailors in San Francisco and had received no complaints * * *" (Italics ours.)

The court in *Nall v. Brennan*, supra, tersely expressed itself:

"A negative fact may be proved by negative evidence." (Citing authorities.)

In *Wheeler v. Fidelity & Casualty Co.*, supra, the court similarly stated:

"These questions called for testimony that was clearly relevant, and if they had elicited negative evidence, as it was assumed they would do, such evidence would not have been inadmissible merely because negative in character."

VI. THE TRIAL COURT ERRED IN ITS INSTRUCTIONS TO THE JURY IN THIS CAUSE.

(A) Instructions as to Issues Involved in This Case.

(1) Instructions.

Over objection of the defense, the court gave the following instructions to the jury as to the scope of the issues in this case:

“The sole and remaining question for you to determine from the evidence in this case is whether or not the drugs covered by the three counts of the information were misbranded as alleged by the Government. If you are satisfied from the evidence beyond a reasonable doubt that the articles of drug bore statements in their labeling or accompanying circulars or newspaper mat that were false or misleading *in any particular in which they are alleged in the information to be false or misleading*, then the drugs in those counts wherein the labeling is so false or misleading in any particular is misbranded in the manner charged by the Government and your verdict shall be guilty as to those counts wherein such misbranding exists. If you find from the evidence that the statements in the labeling of the drugs covered by the respective counts of the information support the therapeutic claims of the defendants and are true, then the drugs covered by those counts wherein the statements of the labeling as to therapeutic claims are true, are not misbranded, your verdict should be not guilty for all or any of those counts wherein you so find.” (Tr. 335-336.)

This particular instruction is covered by Assignment No. VII (Assignment of Errors, Tr. 335; Appendix p. xxii) and was duly excepted to.

Another instruction was given to substantially the same effect:

“It is not necessary for the Government to prove that each and all of the statements of each count of the information contained on the label or in the circulars or newspaper mat are false, or misleading. If the Government has established by the degree of evidence which I have explained to you, *that any one*

material statement or representation as to the therapeutic effect of the drug upon the label or circular or newspaper mat covered by any one count is false or misleading, then the article covered by that count is misbranded within the meaning of the Federal Food, Drug, and Cosmetic Act, and you should find the defendants guilty as to such counts in which you find the article so misbranded. But if the Government has failed to establish to your satisfaction by that degree of proof and beyond a reasonable doubt any one of the charges of misbranding in any one or more of the counts, then you should acquit the defendants as to such counts."

This instruction was duly excepted to, and is covered by Assignment No. VIII. (Assignment of Errors, Tr. 336; Appendix p. xxiii.)

The court gave two other instructions to substantially the same effect. (Assignment of Errors Nos. X and XI, Tr. 338-339; see Appendix pp. xxiv, xxv.)

(2) These instructions were far too broad, and were confusing and misleading to the jury.

As shown above, the information in this case is rather a confusing affair. It first sets forth, by way of quotations, a large number of statements quoted from appellants' advertising matter. These statements, if individually listed, would aggregate a large number of individual items of assertion.

The information then proceeds to allege that "the statements aforesaid" were *false and misleading*. Added to this particular allegation, however, is the all important limitation that these statements were false and misleading because they represented and suggested that this Colusa Oil would be efficacious in the treatment of certain skin diseases, and would accomplish certain other things specifically set forth in the information (as listed at p. 10, supra).

In short, the true and only issues involved in this first count (likewise the second) were those raised and framed

by that portion of the information mentioned in the foregoing paragraph, that is, the portion charging that appellants in effect represented that this drug would be efficacious in treating these skin diseases, etc. Stating the matter a little differently, if appellants disproved this portion of the information (or if the Government failed to prove this portion of its charge) the defendants would be entitled to an acquittal with respect to such count, *irrespective of what the Government proved with respect to the first portion of its information wherein it quotes the various allegedly false statements taken from the advertising matter of appellants.*

For example, a statement is made in the advertising matter (and quoted in the information) that Colusa Oil carries four per cent iodine and has "radium emanations". Let us assume, simply for the sake of argument, that the Government had proved these particular statements to be false. Let us further assume that the proof showed (as it clearly does) that this Colusa Oil was and is very effective in the treatment of psoriasis and these other skin diseases. Certainly under this state of proof, and under the true issues as framed by this information, a conviction would not be justified. To the contrary, an acquittal would be in order.

However, the aforementioned instructions of the court advised the jury, in effect, that if *any* statement in the advertising matter was proved to be false, as charged in the information, the jury should convict. We contend that such an instruction must necessarily have misled the jury into believing that if the Government proved *any* statement in this advertising matter to be false, that was sufficient.

And it should be noted, that these particular instructions were very prejudicial in this case, because of the nature of the proof put on in the Government's case. As shown by the review of evidence hereinabove set forth, the Government devoted most of its proof to attempts to disprove various inconsequential and technical statements in

appellants' advertising matter. For example, it brought a witness all the way from Washington, D. C., to give a lecture on the rather mystical subject of radium and on radium emanations. It put on chemists who, after a most cursory and brief examination of this oil, including a smell or two, testified that the oil did not contain some of the constituents attributed to it in appellants' advertising matter. But when it came to the true and only issue, the efficacy of this oil in the treatment of psoriasis, etc., it put on no proof whatsoever of *facts* covering this vital issue.

As stated above, the defense, instead of devoting its limited trial time to tilting with such windmills, undertook to prove the efficacy of this Colusa Oil by putting on *concrete factual evidence*, in the shape of living testimonials whose skin had been freed by this Colusa Oil of horrible skin afflictions.

Under this state of the Government's case, and because of the aforementioned instructions of the court, the jury was, in our opinion, led to believe that notwithstanding this clear-cut evidence of the defense, they were to convict the defendants if *any* of the statements in the advertising matter were proved to be false.

For these reasons, therefore, we respectfully submit that the aforementioned instructions of the court were erroneous and prejudicial.

(B) Instruction as to Intent.

(1) Instructions.

The court gave the following instruction to which appellants duly excepted:

"The Federal Food, Drug and Cosmetic Act does not make the intent with which an unlawful shipment is made, an ingredient in the offense. *The intent of the defendants is immaterial.*" (Italics ours.)

This instruction is covered by Assignment No. IX. (Assignment of Errors No. IX, Tr. 337, Appendix p. xxv.)

The court also instructed the jury:

“Therefore, if you find from the evidence beyond a reasonable doubt that the drugs involved in the three counts of the indictment, or any of them, were in fact misbranded in the manner alleged in the information or any count thereof, you shall find the defendants guilty as charged in those counts wherein you find the drugs were misbranded, *regardless of the intent in the minds of the defendants.*” (Italics ours.)

This instruction is covered by Assignment No. X (Assignment of Errors, Tr. 378; Appendix p. xxiv), and was duly excepted to.

The court refused to give the following instruction duly requested by appellants:

“To constitute a party guilty of crime, the evidence must show intentional participation in the attempt to violate the statute in question.”

This is covered by Assignment No. XII. (Assignment of Errors, Tr. 339; Appendix p. xxvi.) It also refused to give a similar instruction requested by the defense. (Assignment No. XIII, Tr. 340; Appendix p. xxvi.)

The court also refused to give the following instruction requested by appellant Colgrove, viz.:

“In this case Mr. Colgrove is jointly charged with the defendant corporation in the information. However, you are instructed that it is the law that an officer of a corporation—and here Mr. Colgrove is President of the corporation—cannot be held liable unless he personally knowingly and actually participates in the commission of the acts alleged to be unlawful. An officer of a corporation is not criminally liable for the acts of the corporation performed by other officers or agents. Therefore, unless you find that Mr. Colgrove did not know that the jars of ointment referred to in the third count of the information had not been properly labeled, but that the jars of ointment with the incomplete label had been shipped by clerks and employees of the corporation without Mr. Colgrove’s knowledge, then and in that event you will find Mr. Colgrove personally not guilty.”

This is covered by Assignment No. XIV. (Assignment of Errors, Tr. 340; Appendix p. xxvii.)

(2) Erroneous nature of said rulings.

In an earlier portion of this brief (p. 59, *supra*), we briefly argued the error of the trial court in excluding certain evidence designed to show that the omission of the designation of quantity from the labels on the jars of ointment (the subject matter of the second phase of the third count) was entirely inadvertent, and that this inadvertence was immediately corrected, at substantial expense, when discovered.

The aforementioned rulings and instructions of the court were erroneous for the same reasons that the court's rejection of said proffered evidence reviewed in said earlier portion of this brief (p. 59, *supra*) is claimed to be erroneous. We will not repeat our earlier argument here, but respectfully request that this Honorable Court consider it as also applicable to this phase of our brief.

In short, intent is, we respectfully submit, always a vital element of a crime. Certainly, a citizen should not be convicted of a crime if his alleged omission is due to the mistake or inadvertence of another, for which he is not responsible. The aforementioned instructions of the court, in effect, advised the jury that the appellants were guilty of a crime in connection with this omission from the labels, even though such omission was entirely inadvertent, and the fault of the printer and not that of appellants. For the reasons argued at greater length earlier in this brief, such instructions were, we respectfully submit, erroneous.

Insofar as Assignment of Error No. XIV, dealing with the responsibility of the defendant Colgrove as a corporate officer, the law is well settled that before such an officer can be held responsible for the omission of the corporation, he must be shown to have been responsible

for, or have participated in, the action branded as a crime, viz.:

Fletcher on Corporations, Vol. 4, page 3966, on the subject of criminal liability of corporate officers, says:

“The officer is generally held not liable unless he participates in the unlawful act either directly or as an aider, abetter or accessory, and this is so even though the offense is the violation of a statute which imposes imprisonment as a penalty. A corporate officer, without regard to his position, is ordinarily not criminally liable for corporate acts performed by other officers or agents of the corporation.”

Appellant Colgrove testified positively that he knew nothing about this omission, and that he had nothing to do with the shipment involved in the third count, viz.:

“Mr. Gleason. Q. Mr. Colgrove, did you personally have anything to do with the mailing or sending or dispatching of this ointment to Snapp’s Drugstore in New Mexico? A. No sir.

“Mr. Zirpoli. To which I object as irrelevant and immaterial.

“The Court. Let the question and answer stand. Proceed.

“Mr. Gleason. Did you know or have any knowledge that this ointment was being shipped to the Snapp’s Drugstore in New Mexico, I believe it is, with the particular labels on those bottles that were in fact on them?

“A. I did not know that the labels did not contain the three-quarters of an ounce contents.” (Tr. 175.)

Therefore, the court also erred, we respectfully submit, in refusing to give the instruction requested by defendant Colgrove, as covered by Assignment No. XIV.

CONCLUSION.

From what has been written in the foregoing pages, it is respectfully submitted that the judgment appealed from should be reversed. The evidence is insufficient to sustain this conviction. Furthermore, and apart from the sufficiency of the evidence, the various prejudicial errors committed by the trial court require, we respectfully submit, a reversal of the judgment.

After all else has been said about this case, one thing stands out uncontradicted and unimpeached—and that is that this Colusa Natural Oil has brought to many hopeless and helpless sufferers that surcease from their afflictions which theretofore had been denied them. We know not why this oil brings such relief. Even so outstanding a doctor as Dr. Woodman does not know, for he said (Tr. 81): “I don’t know why it cures; it is just one of those things.” The secret of this healing oil is buried in the recesses of the earth from which it is taken.

The factual testimony of Crawford, Fazio and Stabeck, of Mrs. Mead, Mrs. Loughran and Mrs. Harless, of Everett, Sablich and Scott, of Miss Davis, Mrs. Cameron and Mrs. Welch should be accepted *as a matter of law* in preference to the hypothetical testimony of experts, not one of whom had ever clinically tested or even used the oil. The testimony of Doctors Woodman and Vincent, who have used this oil successfully in hundreds of cases, should be preferred *as a matter of law* to that of doctors who never have used it and know nothing about it.

In conclusion, we are reminded of an event that took place many years ago. A man had been born blind. When grown to young manhood, he sat by the wayside in his helplessness and begged of those who passed by. One came by and saw him and his heart was touched and, calling the blind man to him, healed him and restored to him his sight. Now it might be imagined that great rejoicing would have followed for it had not been heard “that any man had opened the eyes of one that had been born blind.” But the incident was not permitted to go

by unchallenged. The leaders of the village called the young man's parents and demanded to know of them if this was their son and if he had been born blind. And they were frightened and told them the man was their son and was born blind but as he was of age to ask him any further questions. Then they again asked the young man of his healing and added that the one to whom he attributed his sight was a sinner. Then came forth the answer which is still treasured though nineteen hundred years have passed: "Whether he be a sinner or no, I know not; one thing I know, that, whereas I was blind, now I see." (John 9:25.)

We know not why this natural oil has brought to those afflicted souls surcease from the itching and discomfort and pain of psoriasis and the other skin diseases which make "the whole head sick and the whole heart faint". But with all the earnestness we command, and with sincerity as deep as the wells from which this oil is extracted, and for the sake of those who still suffer and are told for them there is no cure, we submit this judgment should be reversed and its stigma removed from those whose conviction was brought about by the errors set forth in this brief.

Dated, San Francisco,
April 1, 1943.

Respectfully submitted,
WALTER M. GLEASON,
WILLIAM B. ACTON,
Attorneys for Appellants.

(Appendix Follows.)

Appendix.



Appendix

ASSIGNMENT No. XV. (Tr. 341.)

The Court erred in sustaining an objection of the Government to questions of defense counsel to the witness Dr. Von Hoover, which questions were designed to elicit the opinion of the witness as to the efficacy of Colusa Natural Oil in the treatment of certain skin diseases. This witness was, as shown in the record, a duly qualified pharmacologist whose business was that of testing preparations and drugs for their therapeutic efficacy; the evidence shows that he was thoroughly trained in his profession, holding degrees from leading universities, including the University of Vienna; that he had practiced this profession for a long period of time, and in this practice had represented, and now represents, leading drug firms of this country as a consultant pharmacologist; that he and some professional associates operate a testing clinic at San Antonio, Texas, and that the function and business of this clinic is that of testing just such preparations as those involved in this case to determine their therapeutic value; that this witness and his said associates had conducted extensive clinical tests of Colusa Natural Oil; that in those tests, they actually tested the oil on many human beings suffering from the various ailments mentioned in the information in this case, including the disease of psoriasis, to determine whether or not this product is efficacious in the treatment of such ailments. After bringing out all of said facts aforementioned, the defendants sought to elicit the opinion of this witness as to the efficacy of this product. The Government objected to such testimony on the ground that because the witness was not actually an M.D., he was not competent to give any such opinion. The Court agreed with counsel for the Government and sustained their objections to this line of examination. The record with respect to this in part is as follows:

“Mr. Gleason. Q. What is your opinion, Doctor, based upon the many tests made by you in your laboratory and in these clinics, and based upon your training as a pharmacologist, and based on your studies of the science of pharmacology, what is your opinion as to the efficacy of Colusa Oil in the treatment of psoriasis?”

“Mr. Zirpoli. I want to interpose an objection, your Honor.

“The Court. Objection sustained. Proceed.

“Mr. Gleason. Note an exception, if your Honor please.

“The Court. Let an exception be noted.”

Said ruling was erroneous in that said evidence was and is clearly competent and material. This witness, a duly qualified specialist in this field of testing drugs had actually made detailed clinical tests to determine the efficacy of this product in the treatment of psoriasis, and the mere fact that he was not an M.D. certainly did not preclude him from testifying on this subject.

ASSIGNMENT No. XVI. (Tr. 343.)

The erroneous and prejudicial effect of the Court's rulings on this phase is further exemplified by the following portions of the record:

“Yes, I observed the use of Colusa Natural Oil on a man named Merculin, who met a premature death. He was a deputy sheriff.

“Q. What skin disease did he have, Doctor?

“Mr. Zirpoli. I object to that on the ground that this witness is not qualified to testify to that.

“The Court. Objection sustained.

“Mr. Gleason. Q. Do you know what disease he had?

“Mr. Zirpoli. The same objection.

“The Court. The same ruling.

“Mr. Gleason. Q. He had a skin disease, did he, Doctor?

“A. He did.

“Q. On what part of his body?

"A. On the right arm.

"Mr. Zirpoli. I ask that the answer go out. He is not competent to testify.

"Mr. Doyle. We will take a ruling of the Court.

"The Court. Proceed."

"Q. After the oil was applied in the clinic, did you observe its effect upon the patient?

"A. Yes.

"Mr. Zirpoli. I object to his observation of the effect of a medication on a patient. He is not competent to testify to the effect of a medication on a patient.

"Mr. Acton. I don't like to argue after your Honor has ruled, but the law is, I think, your Honor, that a man may observe a person, and may know that person is undergoing a certain type of medication, because he is undergoing it right in his own home, or in his laboratory.

"Mr. Gleason. Q. Did you see the Colusa Natural Oil applied to people who had psoriasis in this clinic?

"A. Yes.

"Mr. Zirpoli. Just a moment, I object to that. He is not competent to testify they had psoriasis.

"The Court. Objection sustained.

"Mr. Zirpoli. There are methods of proving those things by bringing proper witnesses."

ASSIGNMENT No. XVII. (Tr. 344.)

The Court erred in sustaining an objection of the Government and striking certain testimony of the witness Dr. Von Hoover with respect to a varicose ulcer case. This case had been treated with Colusa Natural Oil in this clinical testing of Dr. Von Hoover and his associates. This testimony was as follows:

"A. Mrs. A. Nelly is the varicose ulcer.

"The Court. How do you know?

"A. Well, from my experience, your Honor, in the laboratory, and as a doctor of science, and from the knowledge I have of *Materia Medica*, and dermatology and therapeutics, I determine that.

"The Court. By observation.

"A. By observation, yes sir.

"The Court. That is what you base your testimony on?

"A. That is what I base my testimony on, yes sir.

"The Court. All right, proceed.

"Mr. Gleason. May I have this picture marked next in order for identification?"

Thereupon the photograph was marked Defendants' Exhibit H for identification.

"Mr. Zirpoli. May I ask one other foundational question?

"The Court. You may.

"Mr. Zirpoli. You are not a pathologist, are you?

"A. No, sir, I am not a pathologist.

"Mr. Zirpoli. Now I object to his conclusion as to the woman having a varicose ulcer on that further ground.

"The Court. I still sustain the objection and instruct the jury to disregard the testimony.

"Mr. Gleason. May we have an exception?

"The Court. You may have an exception."

For the same reasons as are set forth hereinabove in Assignment XV with respect to other testimony of this same witness, said ruling of the Court was erroneous, and obviously prejudicial to the defendants.

ASSIGNMENT No. XVIII. (Tr. 346.)

The Court erred in sustaining an objection of the Government to certain testimony of the witness Dr. Von Hoover, with respect to the clinical tests made by him and his associates on animals to determine the efficacy of this Colusa Natural Oil, viz.:

"Q. Please state briefly the facts observed by you in these clinical tests in this animal therapy as to the results of the use of Colusa Natural Oil on skin diseases of animals. And, Doctor, confine yourself to the facts that you know of your own knowledge and do not read any of the opinions if they are opinions of Dr. Burby.

"Mr. Zirpoli. I want to make this objection, your Honor. He is asked to testify as to the effect of the application of this oil, which calls for his opinion and conclusion as a veterinarian.

"The Court. Objection sustained.

"Mr. Acton. Will your Honor allow us an exception to that ruling?

"The Court. Note an exception.

"Mr. Gleason. Q. Doctor, in the practice of your profession as a pharmacologist and your work for these firms that you mentioned yesterday, including the Goodman Laboratories and the rest of them, as their consultant, do you in the practice of your profession resort to animal therapy to test the efficacy of drugs and preparations?

"A. Yes.

"Q. Is that part of the ordinary practice of the ordinary pharmacologist?

"A. That is the practice.

"Q. I will ask you to state, Doctor, the facts that you observed, in your clinical examinations, that is to say, this animal therapy, from the use of Colusa Natural Oil upon the skin diseases of dogs and cats used in this animal therapy.

"Mr. Zirpoli. May it please the Court, I submit that the question is identical in different terms and the objection is made exactly as it was made to the last question.

"The Court. The objection will be sustained.

"Mr. Acton. May we have an exception to the ruling?

"The Court. Note an exception.

"Mr. Zirpoli. May I have the record also show that my objection is on the ground that it is irrelevant and immaterial to the case?

"The Court. Let the record so show."

The evidence sought to be elicited by these questions was clearly relevant and material and the Government's objection that this witness was not qualified to testify as to these facts because he was not a licensed veterinarian was without merit. This witness was a qualified pharmacologist and fully qualified to testify as to this animal therapy which, as the record shows, is an orthodox

procedure in the testing of drugs and other such preparations for the treatment of disease.

ASSIGNMENT No. XIX. (Tr. 348.)

The Court erred in sustaining an objection of the Government to certain questions propounded to the witness Dr. Von Hoover by the defense in their effort to bring out all the facts concerning the clinical testing at San Antonio by this witness and his associates of this Colusa Natural Oil. The witness had in his possession an original memorandum prepared by him in these tests, and he testified that this memorandum was made immediately upon the conclusion of these tests, and that the memorandum refreshed his recollection as to the facts observed by him in the use of this oil upon various persons having the diseases mentioned in the information in this case. The witness further testified:

“Q. What is it?

“A. It is a report of the clinical results of oil on the physiological tests on human patients.

“Q. Those are the one hundred and some-odd patients you mentioned yesterday afternoon?

“A. This contains a hundred, this report.

“This report contains the essential facts which I observed in the making of these tests with Colusa Natural Oil on those one hundred patients.

“Q. Does this report, Doctor, contain a statement of the facts observed by you in these clinical tests made by you and your associates in your presence, on human beings, to ascertain the therapeutic value of Colusa Natural Oil in the treatment of psoriasis, athlete's foot, impetigo, varicose ulcers and hemorrhoids?

“A. Yes.

“Q. And also acne? I omitted acne.

“A. No, I don't believe we tested it on acne.

“Q. You are right, Doctor. You did test for poison oak and ivy?

“A. Yes.

“Q. Now then, will you, by reference to this report—

"Mr. Zirpoli. May I ask some foundational questions before I interpose any objections? This report also purports to be the report of Dr. A. Berchermann, M.D., clinician, is that correct?

"A. Yes.

"Q. And this report also purports to show the effects and results secured by the treatment of these human persons by the physician and surgeon, is that correct?

"A. Yes.

"Mr. Zirpoli. Then, your Honor, I submit that the witness is incompetent to testify as to the facts herein contained on the grounds that it is not exclusively the information of the witness, and on the further ground that it contains hearsay testimony predicated upon hearsay facts of a physician and surgeon, a person other than himself, and on the further ground that he is not competent as a physician and surgeon to testify as to the effect and results.

"The Court. Same ruling. The objection will be sustained.

"Mr. Acton. May we be allowed an exception to the ruling?

"The Court. Note an exception."

Said ruling was erroneous and highly prejudicial to the defense. It was most important to the defendants that they be permitted to develop all the facts concerning this clinical testing done by Dr. Von Hoover and his associates. The witness made this memorandum when the facts were clear in his mind, and under settled law he had a right to refer to this original memorandum for the purpose of refreshing his recollection as to the exact facts concerning these very important tests.

ASSIGNMENT No. XX. (Tr. 350.)

The Court erred in sustaining an objection of the Government to a certain question propounded to the witness Dr. Von Hoover by the defense, viz.:

"Mr. Gleason. Q. And in the cases personally observed by you in these clinical tests, in any of these cases did you observe any unfavorable or injurious results from the use of Colusa Natural Oil on these patients?"

"Mr. Zirpoli. Objected to as calling for an opinion and conclusion, your Honor, of this witness, who is not a physician and surgeon.

"Mr. Gleason. That is his business, if your Honor please, and profession; he tests drugs.

"The Court. The objection will be sustained.

"Mr. Acton. May we note an exception to that ruling?"

"The Court. Note an exception."

The fact as to whether or not any injurious or unfavorable results ensued from the use of this Colusa Oil in this clinical testing at San Antonio was, we respectfully submit, a clearly relevant and material fact bearing upon the worth and efficacy of this product.

ASSIGNMENT No. XXII. (Tr. 353.)

The Court erred in sustaining an objection of the Government to certain proposed testimony of the defendant Colgrove. The information charges that certain statements made in the advertising matter issued in connection with this Colusa Natural Oil were false. Among these statements quoted in the information is the statement substantially to the effect that various users of this product have credited it with effective results, etc. In an effort to explain the basis of this particular statement, and to demonstrate the truth thereof, the defense sought to show that the defendants based it in part upon hundreds of voluntary testimonials received from persons who had used this oil in the treatment of the diseases mentioned in the information, viz.:

"Mr. Gleason. Q. In the information, Mr. Colgrove, there is a statement set forth, 'Colusa Natural Oil is credited by other users with producing rela-

tively as remarkable results as above pictured in relieving irritation of external acne, eczema, psoriasis, athlete's foot or ringworm, poison ivy, varicose ulcers, burns and cuts.' You have been marketing this oil for approximately two or three years, as I recall your testimony. Upon what did you base this statement that is contained in this information, the statement just read?

"Mr. Zirpoli. I object, your Honor; it is irrelevant and immaterial as to what he based it on; all that matters is the fact that the statement is there and the statement speaks for itself.

"Mr. Gleason. In this information are various statements quoted from the advertising matter. Counsel has submitted to your Honor instructions that we desire to argue to the effect that if any false statement is contained in any portion of the advertising matter, the mats or otherwise, that this man can be convicted. We desire to show the truth of this statement. We desire to show that when Mr. Colgrove said that 'Colusa Natural Oil is credited by other users' he was telling the truth, and we desire to submit to your Honor hundreds of testimonials in regard to this product from users by the defense.

"The Court. Testimonials cannot go into evidence here.

"Mr. Gleason. I don't want you to think I am going contrary to your ruling. I make the statement, I make it as an officer of this court, that I believe under this information, under settled principles of law——

"The Court. You may believe whatever you see fit.

"Mr. Gleason. May I present the law to your Honor on that subject?

"The Court. No, we will proceed. You make your offer of proof and you have a record to protect you, and I will rule.

"Mr. Gleason. Then we will make the offer of proof and that will conclude this subject. We offer to prove the following facts by this witness at this time:

"First, that from persons to whom this preparation was distributed by these defendants throughout the United States, hundreds of testimonials, the originals of which are here available for inspection, and we

have gone to the trouble of copying them—hundreds of testimonials, voluntary testimonials, have been received by this company and by this defendant.

“We further offer to prove that this product was marketed and distributed to these thousands of persons under a money-back guarantee if not satisfied, and that out of the thousands of people to whom that guarantee was made, approximately two per cent availed themselves of the guarantee.

“We further offer to prove, if the Court please, the truth of the statement contained in this information. We offer these testimonials, and these testimonials will prove the truth of the statement that ‘Colusa Natural Oil is credited by other users with producing relatively as remarkable results as above pictured in relieving irritation of external acne, eczema, psoriasis, athlete’s foot or ringworm, poison ivy, varicose ulcers, burns and cuts,’—the statement contained at lines 13 to 16 on page 3 of this information and reincorporated by reference in later portions of the information. And we offer those facts, if the Court please, as being relevant, pertinent and competent in the proof of the issues involved in this case.

“Mr. Zirpoli. If I might respectfully submit, your Honor, as I have heretofore had occasion to state in arguing various points before the Court, that there was no element of fraud or bad faith involved; it is a simple case of misbranding, and that therefore testimonials are not admissible in evidence. Had this been a fraud case, then the position taken by counsel would have been a proper one, but this is a misbranding case and not a case predicated upon fraud or fraudulent intent.

“The Court. The objection will be sustained.

“Mr. Doyle. Exception if your Honor please.

“The Court. Certainly.

“Mr. Gleason. At this time, if the Court please, simply to complete the record, we desire to have the original testimonials marked for identification.

“Q. To get a preliminary foundation, you have handed me, Mr. Colgrove, a file containing various papers. Did you prepare that file?

“A. No, sir; those letters were written by individuals.

“Q. I mean, did you put these into the file?

"A. Yes, sir.

"Q. What are they?

"A. Voluntary testimonial letters received from purchasers of Colusa Natural Oil products.

"Q. And you personally know that these are voluntary testimonials sent into the office?

"A. Yes, sir."

Thereupon, Mr. Gleason offered these original testimonials in evidence.

"Mr. Zirpoli. Same objection; irrelevant and immaterial.

"The Court. Same ruling.

"Mr. Gleason. May they be marked, then, for identification?

"The Court. Let them be marked for identification."

The proffered testimonials were then marked Defendants' Exhibit Q-1 for identification.

"Mr. Doyle. May we have an exception to the last ruling, your Honor?

"Mr. Gleason. Q. You heard me read, Mr. Colgrove, a statement from the information in this case with respect to other users crediting various and sundry things, a statement contained in some of the advertising matter. Upon what did you base that statement?

"Mr. Zirpoli. Same objection; irrelevant, incompetent and immaterial.

"The Court. Objection sustained.

"Mr. Doyle. I desire an exception, if the Court please."

Said ruling was erroneous because the aforementioned testimonials were admissible and competent and relevant, if for no other purpose than that of explaining the basis for said assertion in the advertising matter, which assertion the Government alleged to be false. The testimonials were also admissible and competent on the issue as to the good faith of the defendants.

ASSIGNMENT No. XXI. (Tr. 351.)

The Court erred in sustaining an objection of the Government to certain testimony of the defendant Colgrove. One of the charges in the Third Count in the information is that the defendants omitted to place on certain labels the designation of the quantity of the contents of the jars in question. The defense sought to show that this omission was entirely inadvertent and was caused by a mistake of the printing firm which printed these labels. The Court ruled that such testimony was irrelevant and immaterial, viz.:

"Mr. Gleason. Did you eventually discover that such labels were being sent out?

"A. I did, and destroyed the rest of them; I destroyed the balance of those labels and ordered correct labels, a new printing of labels.

"Mr. Zirpoli. May I ask that that all be stricken out as irrelevant and immaterial?

"The Court. The objection will be sustained.

"Mr. Acton. May we note an exception?

"The Court. Note an exception.

"Mr. Gleason. Q. When you ordered the labels printed at the McCoy Label Company, did you in your order ask them to put on the label, the designation ' $\frac{3}{4}$ of an ounce'?

"A. I did.

"Mr. Zirpoli. Same objection, your Honor; irrelevant and immaterial as to what he did.

"The Court. Objection sustained."

It was here stipulated that if Miss Nelson, representative of the firm which printed the labels, were called, she would testify this was a mistake on the part of her printing firm; and that in the printing of the labels involved in the Third Count in this case, the designation " $\frac{3}{4}$ of an ounce" was inadvertently omitted from the labels, and that Mr. Colgrove as manager of the defendant company had previously sent said printing firm a letter, marked here as Defendants' Exhibit P for identification, which was received by the McCoy Label Company; and that within a week of this time, Mr. Colgrove had the label

company correct this inadvertence and put upon the label the designation " $\frac{3}{4}$ of an ounce."

"Will that be so stipulated?"

"Mr. Zirpoli. Subject to the objections heretofore made that it is irrelevant and immaterial.

"The Court. Objection sustained.

"Mr. Gleason. An exception, if the Court please.

"The Court. Very well."

Mr. Gleason, at this time, to complete that record, offered in evidence Defendants' Exhibit P for identification, which is the letter Mr. Colgrove previously referred to.

"Mr. Zirpoli. We make the same objection. It was offered once before, and I object again that it is irrelevant and immaterial.

"The Court. Objection sustained.

"Mr. Doyle. May we have an exception?"

"The Court. Exception."

Said testimony was relevant and material because it showed that the alleged omission from the label was entirely inadvertent and without the knowledge of the defendants.

ASSIGNMENT No. XXIV. (Tr. 359.)

The Court erred in sustaining an objection of the Government to a question asked of the witness Colgrove with respect to the source of certain statements inserted in the advertising matter with respect to the efficacy of radium and radium emanations. The Government claimed that these statements were false, and the defense sought to show that the statements were in fact based upon works and treatises of eminent specialists in the field of radium, viz.:

"Mr. Gleason. Do you have available, Mr. Colgrove, the statement upon the basis of which these statements were incorporated in the newspaper mat with respect to the efficacy of radium through the body? Can you give counsel the authorities from which that was procured?"

"A. Yes, sir.

"Mr. Zirpoli. I object to that. Authorities as given by this witness are irrelevant and immaterial.

"Mr. Doyle. May he answer the question, if your Honor please?

"The Court. What question?

"Mr. Doyle. The question as to the source from which he obtained this statement which appears quoted in the mat. It appears as quoted.

"The Court. It matters very little the source of the information or where it came from. We are not concerned with the source of it.

"Mr. Doyle. Exception, if your Honor please."

Defendants had a right to explain the source of any and all statements in the advertising matter which the Government claimed to be false, and the ruling of the Court in this instance was particularly prejudicial because the advertising matter specifically stated that eminent scientists had made the assertions in question about the power of radium. Under these circumstances it was no more than fair and just that the defendants be permitted to give the source and basis of this statement which the Government attacked as false.

ASSIGNMENT No. XXXIV. (Tr. 371.)

The Court erred in sustaining an objection of the Government to a question propounded by the defense to their witness Scott with respect to the following matters. This witness had previously worked for the defendants in the production of this Colusa Oil at the wells in Colusa County. In the advertising matter attacked by the Government as false, is the statement to the effect that the oil was worth \$10,000 a barrel. In order to demonstrate the correctness of this statement, the defense sought to show by this witness that in order to get one gallon of this valuable medicinal oil, it was necessary to pump from these wells many thousands of barrels of water, and

that therefore the production process was so costly as to make a barrel of this medicinal oil worth approximately \$10,000 a barrel, viz.:

“Mr. Gleason. Q. You operated these wells in Colusa County for the production of what we term ordinary crude oil. How many barrels of water are pumped in the pumping of these wells, or how many gallons of water in order to get one gallon of this medicinal oil?

“Mr. Zirpoli. We object to that as irrelevant and immaterial as to the process of how this is manufactured.

“The Court. Objection sustained.

“Mr. Gleason. The only purpose, if the Court please, is, if I might just state it: there has been put in evidence a mat with the statement on it, ‘Oil worth \$10,000 a barrel’. If counsel is going to direct any attention to that, we want to show, if the Court please, that this barrel of Colusa Oil does cost \$10,000; that it requires the production of thousands upon thousands of barrels of water.

“The Court. Is that all?”

The evidence sought to be elicited was relevant and material as bearing upon the truth of the aforementioned statement inserted in said advertising matter and attacked by the Government.

ASSIGNMENT No. XXXI. (Tr. 367.)

The Court erred in overruling an objection of the defense to a question propounded to the witness Dr. Tainter by the Government, viz.:

“Mr. Zirpoli. What is the effect of the application of oil such as the oil here on the skin?

“Mr. Gleason. We object, if the Court please, that no foundation has been laid. We would like to have the doctor state whether or not he ever applied the oil to such a condition. Have you ever applied that oil to a condition of poison oak?

“Mr. Zirpoli. I can cite innumerable cases under the Federal Food and Drug Act, your Honor, which

provide that when a man who is a scientist particularly learned in a particular field takes the stand, he is competent to testify about those matters for which he is specifically trained by reason of his learning and his instruction and his scientific training; and furthermore, there are innumerable cases that say that the particular doctor need not even have applied the particular product involved or have used or seen it if he knows its constituent, component parts and has been given the necessary foundation therefor. And that has been done, because we have told the doctor what this stuff consists of, and the doctor himself has seen it, and from his scientific medical knowledge he can give his opinion as to what the effect would be.

"Mr. Gleason. If the Court please, we doubt very seriously whether counsel can produce any case covering testimony of this type. We would like to ask one question, if we may, for foundational purposes, and that question will be whether or not the doctor has ever applied oil of this type to that kind of a disease.

"The Court. The Court is prepared to rule.

"Mr. Zirpoli. That is cross-examination.

"The Court. The Court is prepared to rule. You may develop that on cross-examination. The objection will be overruled.

"Mr. Acton. Will your Honor allow us an exception?

"The Court. Yes."

The Government had not laid any foundation to show that the witness had applied this particular oil to the skin, and in view of the complex nature of the oils, to permit the witness to testify as to the effect of Colusa Natural Oil on the skin without ever having subjected it to proper tests was incompetent, irrelevant and immaterial.

ASSIGNMENT No. XXVIII. (Tr. 364.)

The Court erred in overruling an objection of the defense to a question propounded to Dr. Tainter, a witness for the Government, viz.:

"Mr. Zirpoli. Q. Doctor, from your examination of this product, was it any different, from your own experience, from ordinary crude petroleum oil?

"Mr. Gleason. Just a moment. If the Court please, we object to that on the ground that it is incompetent, irrelevant and immaterial; that no proper foundation has been laid. And we stress this objection, if the Court please, for the reason, as has already been brought out, there are thousands of different types of crude oils with thousands of different constituents, and for a blanket assertion to be made of this type is utterly unfair. If the Court please, we submit this: if the doctor wants to testify as to the crude oils that he has had experience with, he should give us the formulas and the designations, paraffine, asphalt or otherwise, and then compare this oil with them. Then we have some facts.

"The Court. The Court is prepared to rule. If the witness knows he may answer. The objection may be overruled.

"Mr. Acton. Will your Honor allow us an exception before the answer?

"The Court. Note an exception.

"A. Well, because there are many varieties of oils, the material was different, of course, from a considerable number of them. However, it had no distinctive properties in the sense that it smelled like ichthyol or materials which you would recognize as having medicinal power, so that as far as I could make out, it was the commonest kind of crude oil in the sense that it had no special properties that were distinctive or characteristic."

Said ruling of the Court was erroneous because, as the record shows, there are a great many varieties of crude oils having many different characteristics. The Government sought in this case to impress on the minds of the jury their claim that this was an ordinary crude oil. The question above quoted was designed to carry out this purpose and was prejudicial to the defendants for the reasons stated in the argument above quoted in connection with this question. Said question was wholly incompetent, irrelevant and immaterial.

ASSIGNMENT No. XXV. (Tr. 361.)

The Court erred in permitting the Government to pursue a long line of cross-examination of the defendant Colgrove with respect to his various other business activities, none of which said facts had any relevancy or materiality in the case at bar. The Court permitted this examination over repeated objection of the defense and exceptions were duly taken to such ruling. The following illustrates this line of examination, viz.:

“Q. In 1930, did you continue the operation of the insurance business in the State of Illinois?”

“Mr. Gleason. We object to that on the ground that it is incompetent, irrelevant and immaterial, and has nothing to do with the issues in this case.

“The Court. Objection overruled.

“Mr. Gleason. May we have an exception?”

“The Court. Note an exception.

“A. Yes, sir.”

It was here stipulated that defendants' objections would run to this line of questioning with exceptions reserved.

Said ruling of the Court was erroneous and said line of examination was not proper cross-examination.

ASSIGNMENT No. XXVI. (Tr. 361.)

The Court erred in permitting the Government to cross-examine the defendant Colgrove at length with respect to a certain letter of a Dr. Woodman. Said examination was wholly incompetent, irrelevant and immaterial and was not proper cross-examination, viz.:

“Mr. Gleason. Just a moment, Mr. Colgrove. We object to this on the ground that it is incompetent, irrelevant and immaterial, if the Court please, not proper cross-examination, has no bearing upon the issues in this case.

“Mr. Zirpoli. I would like to submit I am entitled to test the credibility of the witness, your Honor.

"Mr. Gleason. It has nothing to do with the credibility of the witness.

"Mr. Zirpoli. Yes it has.

"The Court. When was this?

"Mr. Zirpoli. The witness took the stand.

"The Court. In 1939?

"Mr. Gleason. This is a letter, if the Court please, dated October 28, 1940. So the Court will know——

"The Court. I will allow it. Objection overruled.

"The letter you show me is a copy of a letter written me by Dr. Woodman, but the original letter did not have 'M. D.' after his signature; my stenographer must have added the 'M. D.' by mistake. When I submitted the letter it evidently had 'M.D.' on it; I knew Dr. Woodman for six months and saw him the day of the hearing; the photostat you show me is a copy of the letter Dr. Woodman gave me and 'M.D.' does not appear on it.

"Mr. Gleason. We object to that on the ground that it is utterly incompetent, irrelevant and immaterial. What bearing has that on this case?

"The Court. That is a matter entirely for the jury. Let the jury determine.

"Mr. Gleason. He testified that his secretary made a mistake.

"Mr. Zirpoli. I will ask that these two exhibits be marked next in order in evidence as one exhibit.

"Mr. Gleason. May we have an exception?"

The documents were admitted and marked Government's Exhibit No. 13.

"Mr. Gleason. May we have an exception, if the Court please?

"The Court. Note an exception."

ASSIGNMENT No. XXVII. (Tr. 363.)

The Court erred in sustaining an objection of the Government to a question propounded by defense counsel to the defendant Colgrove. The defense sought to bring out, in order to show the good faith of the defendants in the marketing of the products involved in this case,

that their practice was to give this oil free of charge to persons needing it, if such persons could not pay for it, viz.:

“Mr. Gleason. Has it been your practice, Mr. Colgrove, in the distribution of this oil, to give it free of charge to hospitals, doctors, and whoever wanted it for use if they could not pay for it?

“Mr. Zirpoli. I object to this, your Honor, as a pure and simple sympathetic appeal.

“Mr. Gleason. It certainly shows good faith, if the Court please.

“Mr. Zirpoli. I submit that good faith is not in issue.

“The Court. The objection will be sustained. Let it go out and let the jury disregard it.

“Mr. Acton. May we also have an exception, your Honor?

“The Court. Note an exception.”

The facts sought to be elicited by this question directly bore upon the good faith of these defendants whom the Government had charged with criminal practices.

ASSIGNMENT No. XXXII. (Tr. 369.)

The Court erred in sustaining an objection of the Government to a question propounded by the defense to their witness Howard Everett. The defense sought to elicit testimony of this witness as to the effects observed by him in the use of Colusa Oil by another person. The Court precluded such testimony by its ruling, viz.:

“Mr. Gleason. Did you ever have any occasion, Mr. Everett, to observe personally the effect of Colusa Capsules—the use of Colusa Capsules—on any other person?

“Mr. Zirpoli. I want to interpose an objection, your Honor. While I recognize that it is proper for counsel to bring a witness into the courtroom who himself used it and can testify as to what this effect has been with relation to his personal use, he cannot call a lay witness to testify as to the effect of the

use of a product of this nature on another person, particularly since he is not qualified. He cannot tell us, nor is he qualified to tell us, of the condition that the particular person may have been suffering from; nor is he qualified to tell us of the results or the beneficial effects.

"The Court. Just a moment. Be seated, gentlemen. The Court is prepared to rule. Read the question, Mr. Reporter."

(Question read.)

"The Court. The objection will be sustained.

"Mr. Acton. Will your Honor allow us an exception to the last ruling?

"The Court. Certainly."

The following illustrates how unfairly the testimony was restricted in this connection, viz.:

"Q. Will you describe the physical condition of the man prior to his use of the oil?

"Mr. Zirpoli. What do you mean by 'physical condition'? His appearance as the witness actually saw it?

"Mr. Gleason. That is what we are limited to under your objection.

"A. Why, he was ill.

"Mr. Zirpoli. Your Honor, that very statement is a conclusion; that he was ill calls for a conclusion; that is not a physical description. I ask that that be stricken from the record.

"The Court. It may go out.

"The Witness. He was thin, depressed.

"Mr. Zirpoli. I ask that the conclusion that he was depressed go out; that obviously is not a conclusion that a person can make.

"The Court. It may go out."

ASSIGNMENT No. XXIII. (Tr. 358.)

The Court erred in sustaining an objection of the Government to certain proposed testimony of the defense, viz.:

"Mr. Gleason. Q. Mr. Colgrove, in the course of your marketing of this product, can you tell us the

number of sales that have been made of this product to people throughout the United States?

"A. Many thousands of them.

"Q. You sold your product on a money-back guarantee, did you not?

"A. Yes.

"Q. Can you tell us how many of the people to whom you sold this product throughout the United States availed themselves of the opportunity to receive their money back?

"Mr. Zirpoli. I object to that as irrelevant and immaterial, and a form of negative proof. I object to it.

"The Court. The objection will be sustained. We are not here concerned with any money-back guarantee. There is no issue involved in this case about money or money back for any sales. Let us proceed.

"Mr. Acton. Will your Honor allow us an exception to the last ruling?

"The Court. Certainly."

The facts which the defense sought to elicit by said question aforementioned were competent, relevant and material because the issues in this case involve several things. In the first place, the good faith of the defendants was in issue, this being a criminal case; in the second place, the efficacy of this product was in issue. The facts sought to be elicited by the aforementioned question would have borne directly upon and would have been relevant to both of these issues.

ASSIGNMENT No. VII. (Tr. 335.)

The Court erred in giving the following instruction to the jury, viz.:

"The sole and remaining question for you to determine from the evidence in this case is whether or not the drugs covered by the three counts of the information were misbranded as alleged by the Government. If you are satisfied from the evidence beyond a reasonable doubt that the articles of drug bore statements in their labeling or accompanying circu-

lars or newspaper mat that were false or misleading in any particular in which they are alleged in the information to be false or misleading, then the drugs in those counts wherein the labeling is so false or misleading in any particular is misbranded in the manner charged by the Government and your verdict shall be guilty as to those counts wherein such misbranding exists. If you find from the evidence that the statements in the labeling of the drugs covered by the respective counts of the information support the therapeutic claims of the defendants and are true, then the drugs covered by those counts wherein the statements on the labeling as to therapeutic claims are true, are not misbranded, your verdict should be not guilty for all or any of those counts wherein you so find."

Said instruction is erroneous in that it is too broad. It in effect instructs the jury that if any false statement was contained on the label or the circulars or advertising material accompanying these products, that would be sufficient to justify a conviction of the defendants, whereas in truth and in fact the only alleged false statements which were in issue were and are those specifically set forth in the information, and which relate to certain phases of the therapeutic efficacy of said products. Said instruction was duly excepted to.

ASSIGNMENT No. VIII. (Tr. 336.)

The Court erred in giving the following instruction to the jury, viz.:

"It is not necessary for the Government to prove that each and all of the statements of each count of the Information contained on the label or in the circulars or newspaper mat are false or misleading. If the Government has established by the degree of evidence which I have explained to you, that any one material statement or representation as to the therapeutic effect of the drug upon the label or circular or newspaper mat covered by any one count is false or misleading, then the article covered by that count

is misbranded within the meaning of the Federal Food, Drug, and Cosmetic Act, and you should find the defendants guilty as to such counts in which you find the article so misbranded. But if the Government has failed to establish to your satisfaction by that degree of proof and beyond a reasonable doubt any one of the charges of misbranding in any one or more of the counts, then you should acquit the defendants as to such counts."

Said instruction is erroneous in that it is too broad. It in effect instructs the jury that if any false statement was contained on the label or the circulars or advertising material accompanying these products, that would be sufficient to justify a conviction of the defendants, whereas in truth and in fact the only alleged false statements which were in issue were and are those specifically set forth in the information, and which relate to certain phases of the therapeutic efficacy of said products. Said instruction was duly excepted to.

ASSIGNMENT No. X. (Tr. 338.)

The Court erred in giving the following instruction to the jury, viz.:

"Therefore, if you find from the evidence beyond a reasonable doubt that the drugs involved in the three counts of the indictment, or any of them, were in fact misbranded in the manner alleged in the information or any count thereof, you shall find the defendants guilty as charged in those counts wherein you find the drugs were misbranded, regardless of the intent in the minds of the defendants."

Said instruction is erroneous in that it conveyed the impression to the jury that even if the alleged acts or offenses with which defendants were charged in the information were due to inadvertence and through no willful intent or knowledge on the part of the defendants, the defendants would still be guilty of a crime. Said instruction was duly excepted to.

ASSIGNMENT No. XI. (Tr. 338.)

The Court erred in giving the following instruction to the jury, viz.:

“If, after hearing the evidence in this case, you reach the conclusion that the drugs or products involved here were harmless, that does not excuse the defendants, if you find that they placed statements upon said drugs which were false, concerning the curative and therapeutic effects of such products, as the danger and injury to the public from representations of this type is in that it induces persons frequently to rely in serious cases upon preparations without healing virtue when, but for this reliance, they would secure proper advice and treatment for the ills which affect them.”

Said instruction is erroneous in that it in effect instructs the jury that if any false statement was contained on the label or the circulars or advertising material accompanying these products, that would be sufficient to justify a conviction of the defendants, whereas in truth and in fact the only alleged false statements which were in issue were and are those specifically set forth in the information, and which relate to certain phases of the therapeutic efficacy of said products. Said instruction was duly excepted to.

ASSIGNMENT No. IX. (Tr. 337.)

The Court erred in giving the following instruction to the jury, viz.:

“The Federal Food, Drug and Cosmetic Act does not make the intent with which an unlawful shipment is made, an ingredient in the offense. The intent of the defendants is immaterial.”

Said instruction is erroneous in that it conveyed the impression to the jury that even if the alleged acts or offenses with which defendants were charged in the information were due to inadvertence and through no willful intent or knowledge on the part of the defendants,

the defendants would still be guilty of a crime. Said instruction was duly excepted to.

ASSIGNMENT No. XII. (Tr. 339.)

The Court erred in refusing to give the following instruction submitted and requested by defendants, viz.:

“To constitute a party guilty of crime, the evidence must show intentional participation in the attempt to violate the statutes in question.”

Defendants duly excepted to said ruling. Said instruction was and is proper, and particularly related to the alleged misbranding charged in Count Three. The evidence shows that the omission of certain matter from the labels on the hemorrhoid ointment was inadvertent and without the knowledge of the defendants.

ASSIGNMENT No. XIII. (Tr. 340.)

The Court erred in refusing to give the following instruction submitted and requested by defendants, viz.:

“There must be an intentional participation in the transaction with a view to the common design and purpose, before a party can be guilty of crime.”

Defendants duly excepted to said ruling. Said instruction was and is proper, and particularly related to the alleged misbranding charged in Count Three. The evidence shows that the omission of certain matter from the labels on the hemorrhoid ointment was inadvertent and without the knowledge of the defendants.

ASSIGNMENT No. XIV. (Tr. 340.)

The Court erred in refusing to give the following instruction proposed and requested by defendant Colgrove, viz.:

“In this case Mr. Colgrove is jointly charged with the defendant corporation in the information. However, you are instructed that it is the law that an officer of a corporation—and here Mr. Colgrove is President of the corporation—cannot be held liable unless he personally knowingly and actually participates in the commission of the act alleged to be unlawful. An officer of a corporation is not criminally liable for the acts of the corporation performed by other officers or agents. Therefore, unless you find that Mr. Colgrove did know that the jars of ointment referred to in the Third Count of the information had not been properly labeled, but that the jars of ointment with the incomplete label had been shipped by clerks and employees of the corporation without Mr. Colgrove’s knowledge, then and in that event you will find Mr. Colgrove personally not guilty.”

Said ruling was duly excepted to.

Said defendant was simply a corporate officer and cannot be held responsible for corporate acts, except those in which he had a personal participation, and the jury should have been so instructed, particularly with respect to the charge in the Third Count which involved the omission from certain labels of certain quantitative data.

DEFENDANTS' EXHIBIT P FOR IDENTIFICATION.

6-26-42

Field Headquarters,
Williams, California

COLUSA PRODUCTS CO.

Colusa Natural Oil

Colusa Natural Oil Capsules

Colusa Natural Oil Hemorrhoid Ointment

General Offices
Mercantile Building
Berkeley, California
Telephone Thornwall 9112

January 22, 1941

McCoy Label Co.
Montgomery and Commercial Sts.
San Francisco, California

Attention Miss Nelson

Dear Miss Nelson:

The labels were picked up Monday and on opening today I find the capsule labels unuseable because they fail to have the following wording on them:

“A Natural unrefined Petroleum oil containing sulphonated hydrocarbons”

which should appear just above the words:

“in capsules for internal use”

then following that should appear the amount of bottle contents like:

“30 capsules”—for one label

and

“100 capsules”—for other label

I need 2500 of each, front labels only, next week. Please rush them out and send them C.O.D. Also send me 2500 ointment labels with the same wording on the ointment label that is shown on the enclosed box-cover—plus (please add) “contents $\frac{3}{4}$ oz.”

You can make up a good label for this that will fit the little blue jar I am sending under separate cover. No back label necessary on the ointment, and I do not want the ointment label to run completely around the jar, half-way around is sufficient. If you can follow same sort of a general pattern as the oil and capsule labels, I will like it.

Sincerely yours,

C. W. COLGROVE

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No. 10,189

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

EMPIRE OIL AND GAS CORPORATION (a corporation), and CHESTER WALKER COLGROVE,
trading as Colusa Products Company,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
United States Attorney,

A. J. ZIRPOLI,

Assistant United States Attorney,
Post Office Building, San Francisco,

Attorneys for Appellee.

FILED

MAY 27 1943

PAUL P. O'BRIEN,
CLERK

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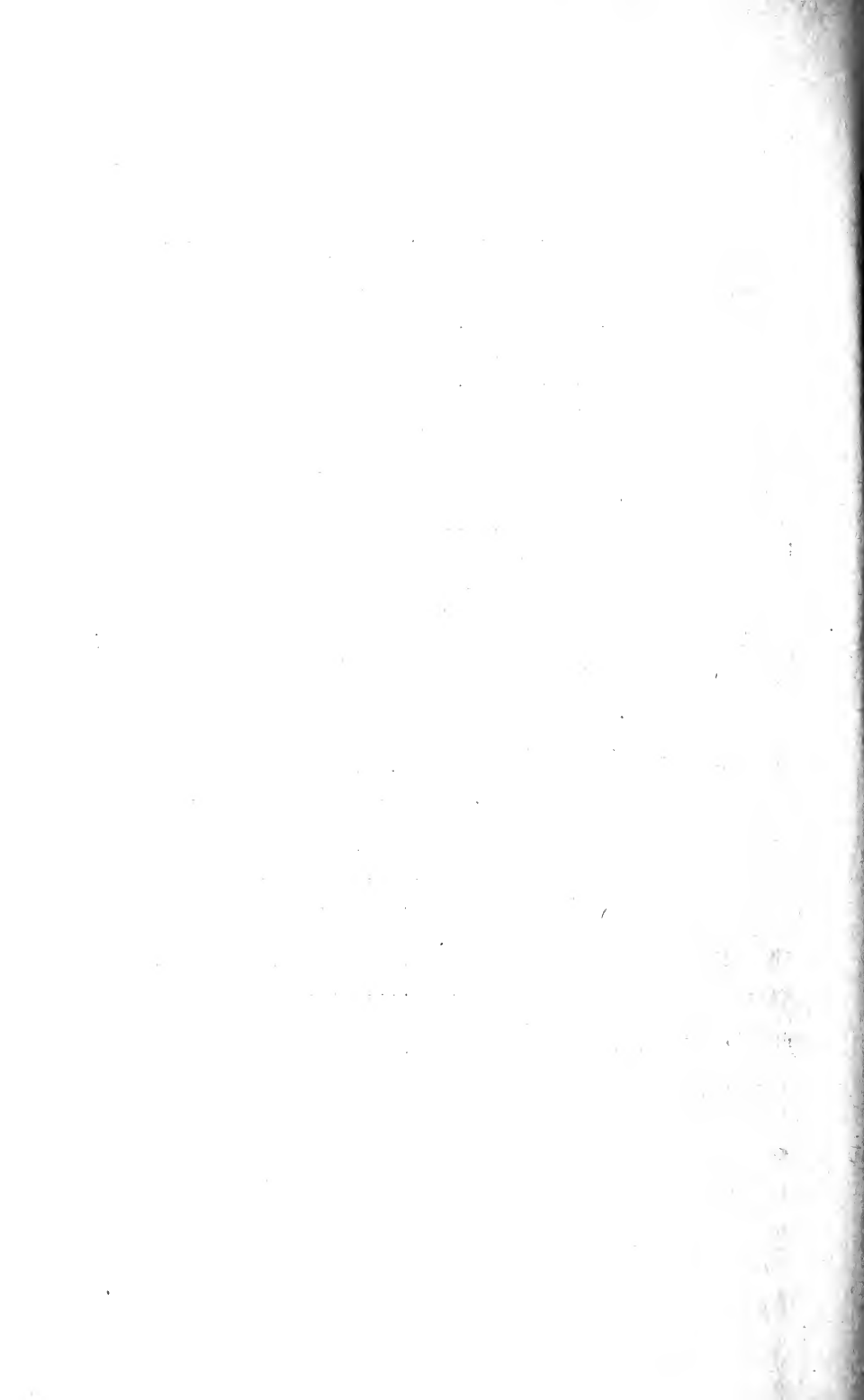
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No. 10,189

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMPIRE OIL AND GAS CORPORATION (a corporation), and CHESTER WALKER COLGROVE,
trading as Colusa Products Company,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from the judgments of conviction (Tr. 308 and 310) of the District Court of the United States for the Northern District of California, Southern Division, convicting appellants on an information in three counts charging them with violations of Section 331(a) and 352(a), (b)(2) of Title 21 USCA, in that they unlawfully introduced and delivered for introduction in interstate commerce certain misbranded drugs. After pleas of not guilty, a jury trial was had, and both appellants were convicted on all three counts of the information.

The Court below had jurisdiction of this case under and pursuant to the provisions of Title 28 USCA, Section 41, subdivision (2). The jurisdiction of this Honorable Court is apparently invoked under the provisions of Title 28 USCA, Section 225, subdivision (a), first and subdivision (d).

FACTS OF THE CASE.

Appellants' views as to the true issues of this case are not in accord with those of appellee and as a result there will be no agreement as to the facts essential to a determination of those issues. Appellants' statement of the case (Appellants' Opening Brief, pp. 2-6) is *too limited in scope* and does not clearly and *impartially* set forth *all* the essential facts.

On March 24, 1942, the United States Attorney for the Northern District of California, filed an information in the Court below against appellants charging them with violations of the Federal Food, Drug and Cosmetic Act. The information is in three counts and the essential portions of each count allege as follows:

Count I:

"That Empire Oil and Gas Corporation, * * * and Chester Walker Colgrove, President and Treasurer, said corporation trading under the fictitious name of Colusa Products Company, at Berkeley, State of California, did * * * on or about the 31st day of January, in the year nineteen hundred and forty-one, * * * unlawfully introduce and deliver for introduction in interstate commerce, from Berkeley, State of California, to

Mountainair, State of New Mexico * * * a certain package containing a number of bottles, each bottle containing a drug * * *."

(Then follows a description of the labeling of Colusa Natural *Oil* on the bottles and a partial statement of the contents of an accompanying circular and newspaper mat.)

"That the said drug * * * was then and there misbranded * * * in that the statements aforesaid, regarding the efficacy of said drug in the cure, mitigation, treatment or prevention of diseases in man * * * were false and misleading, in this, that the said statements represented and suggested that the said drug, when used alone or in conjunction with Colusa Natural Oil Capsules, would be efficacious in the treatment of eczema, psoriasis, acne, ringworm, Athlete's Foot, burns, cuts, poison ivy, and varicose ulcers, would act on surface skin irritations as a stimulant and would increase circulation and aid in healing; would be efficacious to relieve discomfort and pain; would be efficacious to restore the normal skin surface, and would be efficacious to kill or check disease germs; whereas, in truth and in fact, said drug, when used alone or in conjunction with Colusa Natural Oil Capsules, would not be efficacious in the treatment of eczema, psoriasis, acne, ringworm, Athlete's Foot, burns, cuts, poison ivy or varicose ulcers; would not act on surface skin irritations as a stimulant, would not increase circulation, and would not aid in healing; would not be efficacious to relieve discomfort or pain; inhibit the spreading of skin irritations, or restore the normal skin surface, and would not be efficacious to kill or check disease germs * * *". (Tr. 2-7).

Count II:

“That * * * (appellants) * * * did (at the same time and place recited in Count I) * * * unlawfully introduce and deliver for introduction in interstate commerce * * * a certain package containing a number of bottles, each bottle containing a drug * * *.”

(Then follows a description of the labeling of Colusa Natural Oil *Capsules* and a statement of the contents of the circular and newspaper mat referred to in Count I.)

“That said drug * * * was then and there misbranded (in the manner alleged in Count I when used alone or in conjunction with Colusa Natural Oil) * * *”. (Tr. 7-10).

Count III:

“That * * * (appellants) * * * did (at the time and place recited in Count I) * * * unlawfully introduce and deliver for introduction in interstate commerce * * * a certain package, containing a number of jars, each containing a drug * * *.”

(Then follows a description of the labeling on the jars and a partial statement of the contents of an accompanying circular.)

“That said drug * * * was then and there misbranded * * * in that the statements aforesaid, appearing on the jar label and circular, as aforesaid, regarding the efficacy of said drug in the cure, mitigation, treatment or prevention of disease in man, were false and misleading, in this, that the said statements represented and suggested that said drug would be efficacious in the treatment of hemorrhoids and piles, whereas, in truth and fact, said drug would not be efficacious in the treatment of hemorrhoids or piles;

“That said drug was further misbranded in that it was in package form and its label did not bear an accurate statement of the quantity of the contents in terms of weight or measure.” (Tr. 10-12).

On April 10, 1942, appellants entered pleas of not guilty to all three counts of the information (Tr. 13). No demurrer or other objection to the information was filed excepting an oral motion made at the close of the trial to required appellee to elect as to which of the two alleged offenses covered by the third count of the information it desired to submit to the jury (Tr. 274). The case went to trial before a jury and on June 30, 1942, the jury returned a verdict of guilty as to both appellants on all three counts (Tr. 294).

The Court sentenced Chester Walker Colgrove to a fine of \$500.00 on each count and imprisonment for six months in jail on each count and further ordered that the jail sentences should run concurrently, with a proviso for the discharge of Chester Walker Colgrove upon the payment of the fines (Tr. 310 and 311).

The Court sentenced the Empire Oil and Gas Corporation to a fine of \$1.00 on each count (Tr. 309).

From these two judgments appellants take their present appeal.

At the close of the case appellants each moved the Court for directed verdicts of not guilty on each count of the information. These motions were denied (Tr. 273-274).

Before judgment was pronounced appellants each filed motions for new trial (Tr. 294-297) and in arrest of judgment (Tr. 296-298) which were denied.

In support of their contention that the judgments of the lower Court should be reversed, appellants argue:

“I. The Third Count is Duplicitous.

II. The Evidence is Insufficient to Warrant a Conviction.

III. The Trial Court Committed Highly Prejudicial Errors in Connection With the Testimony of Dr. C. E. Von Hoover, a Vital Defense Witness.

IV. The Trial Court Committed Prejudicial Error in Refusing to Admit in Evidence the Voluntary Testimonials Offered by the Defense.

V. The Trial Court Committed Various Other Prejudicial Errors at the Trial.

VI. The Trial Court Erred in its Instructions to the Jury.”

The evidence relative to these contentions of appellants will be hereinafter set forth and discussed in detail as each contention is answered.

QUESTIONS.

From the contentions of appellants it can be said that four questions are raised by this appeal.

1. Did the Court below err in denying appellants' motion to require “the Government to elect as to which of the two alleged offenses covered by the third count of the information the Government desired to submit to the jury?”

2. Is the evidence sufficient to sustain the verdict of the jury?

3. Did the Court below commit prejudicial error in connection with the testimony of Dr. C. E. Von Hoover and other evidence?

4. Did the Court below err in its instructions to the jury?

ARGUMENT.

THE THIRD COUNT OF THE INFORMATION ALLEGES ONLY ONE OFFENSE.

The third count of the information charges that appellants introduced and delivered for introduction into interstate commerce a certain drug misbranded in two particulars.

(1) In that the statements appearing on the jar label and in the circular represented and suggested that the drug would be efficacious in the treatment of hemorrhoids and piles, whereas in truth and in fact, said drug would not be efficacious in the treatment of hemorrhoids and piles.

(2) In that it was in package form and its label did not bear an accurate statement of the quantity of the contents in terms of weight or measure.

The provisions of the Federal Food, Drug and Cosmetic Act on which this count is predicated are found in Title 21 USCA, Sections 331(a), 333(a) and (b) and 352(a) and (b) (2) and provide as follows:

Section 331:

“The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device or cosmetic that is misbranded.”

Section 333(a):

“Any person who violates any of the provisions of Section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than \$1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than \$10,000, or both such imprisonment and fine;

(b) Notwithstanding the provisions of subsection (a) of this section, in case of a violation of any of the provisions of section 301, *with intent to defraud or mislead*, the penalty shall be imprisonment for not more than three years, or a fine of not more than \$10,000, or both such imprisonment and fine.” (Italics supplied.)

Subsection (b) is quoted here because it is apparent from a reading thereof that intent is not a necessary element of proof under subsection (a), and that when an intent to defraud or mislead is charged it must be by indictment since the maximum penalty is three years. Here we have an information under subsection (a).

Section 352:

“A drug or device shall be deemed to be misbranded:

(a) If its label is false or misleading in *any particular*;

(b) If in package form unless it bears a label containing * * * (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count; Provided, That under clause (2) of this paragraph reasonable variation shall be permitted, and exemption as to small packages shall be established, by regulation prescribed by the Secretary”. (Italics supplied.)

In this connection it is to be observed that the word “package” means the immediate container of the article which is intended for use or consumption by the public.

McDermott v. State of Wisconsin, 228 U. S. 115.

Appellants’ objection to the third count of the information is predicated upon the proposition that each type of misbranding enumerated in Section 352 quoted above constitutes a separate offense. Thus, where goods are shipped in interstate commerce, which are misbranded in only one of the ways specified in that section, only one offense has been committed. But where goods are misbranded in a number of specified ways, although there is but one shipment, as many offenses are committed as there are different types of misbranding. The sophistry of this construction appears evident in view of the position that the single substantive offense is the interstate shipment of

adulterated or misbranded goods. Section 352 merely enumerates the various ways in which an interstate shipment of goods may be deemed misbranded. Whether more than one offense had been committed does not depend upon the number of ways in which a particular article has been misbranded, but rather upon whether more than one shipment into interstate commerce has been made of such misbranded article. In

Weeks v. United States, 245 U. S. 618,

it was held that it was not the several kinds of misbranding that was made unlawful under Section 8 of the Food and Drugs Act of 1906, but the shipment or delivery for shipment from one state to another of the misbranded article.

It is a recognized rule of criminal pleading that a count is not duplicitous that enumerates different means adopted or things done to accomplish the offense. Thus, in

United States v. Swift, 188 Fed. 92 (D. C., N. D. Ill. 1911),

an indictment charging a combination in restraint of interstate commerce in violation of the Anti-Trust Act was not bad for duplicity because it charged and enumerated different means adopted or different things done to accomplish the object of the combination. In its opinion the Court said:

“It is urged also that the first and second counts of indictment No. 4,509 are bad for duplicity, because they charge a combination in restraint of trade in the purchase of livestock, and also

in the sale of fresh meat. The objection is not sound. The crime charged is a combination in restraint of trade. Such a combination may design to accomplish its object in many different ways, and the enumeration of the various means adopted does not render the indictment bad for duplicity. *Duplicity in an indictment means the charging of more than one offense, not the charging of a single offense committed in more than one way. Duplicity may be applied only to the result charged, and not to the method of its attainment.*" (Italics supplied.)

Similarly, in the case of

United States v. B. Goedde and Co., 40 Fed. Supp. 523 (D. C., E. D. Ill., 1941),

it was held that an indictment for conspiracy was not duplicitous because it alleged different means of accomplishing such purpose. In its opinion the Court stated:

"I do not accept the suggestion that several separate and distinct conspiracies are charged. An indictment is not duplicitous because it alleges different means of accomplishing the purpose. Duplicity arises from charging more than one offense, not from charging a single offense committed in more than one way, *Swift & Co. v. United States*, * * * or from pleading different acts, if they contribute to the ultimate, charged offense. * * * The test for duplicity must be applied only to the result charged and not to averments of various methods of its attainment."

The Federal Food, Drug, and Cosmetic Act does not contain any expression or implication of Con-

gressional intent to create as many distinct and separate offenses or crimes as there are diverse forms of adulteration or misbranding. The definitions in the Act of adulteration and misbranding are not definitions of offenses or crimes against the United States but they are mere descriptions, designations, or specifications of the character of foods and drugs which a person may not ship in interstate commerce without thereby violating the single prohibition of the Act against their shipment and thereby commit an offense against the United States. There is nothing in the Act to warrant the conclusion that if a single article of drugs once shipped or once delivered for shipment was misbranded in two or more respects, the Courts should treat such article as twice (or more often) shipped and the person who shipped the article as having incurred violations for two or more separate and distinct offenses and subject to two or more times the penalty.

Where Congress intended two or more offenses by a single transaction it explicitly so stated.

See

Ebeling v. Morgan, 237 U. S. 625,
where the indictment was brought under a statute which made the cutting and opening of each mail sack a distinct and separate offense.

Furthermore it is a well-settled rule of criminal pleading that, where an offense against a criminal statute may be committed in one or more of several ways, the indictment or information may, in a single

count, charge its commission in any or all of the ways specified in the statute.

See:

31 *C. J.* 764;

22 *Cyc.* 380;

Shepherd v. United States (CCA-9), 236 Fed. 73;

Turner v. United States (CCA-D.C.), 16 F. (2d) 535;

Simpson v. United States (CCA-9), 299 Fed. 940.

In

Crain v. United States, 162 U. S. 625,

the Supreme Court stated that it "perceives no reason why the doing of the prohibited thing in each and all of the prohibited modes, may not be charged in one count".

Appellants' argument assumes, without indicating how or in what manner, that count three recites two separate and distinct offenses and then goes on to cite cases condemning this practice.

From the authorities cited by appellee it should be perfectly obvious that but one offense is alleged in count three and that there is therefore no merit to appellants' contention that count three is duplicitous.

Furthermore the question whether the prosecution should be compelled to elect came late in the trial and was a matter purely within the discretion of the trial Court.

Guy v. United States, 107 F. (2d) 288, 291.

THE EVIDENCE IS SUFFICIENT TO WARRANT A CONVICTION
ON ALL THREE COUNTS OF THE INFORMATION.

Appellants throughout their brief stress the alleged failure of the Government to prove that the drugs in question are not efficacious in the treatment of *psoriasis* and seem to forget that all the Government need do is prove that the drugs in question are misbranded in *any particular* (not every particular).

Counts one and two are predicated upon false and misleading claims that the drugs described in said counts, when used individually or conjunctively, "would be efficacious in the treatment of eczema, psoriasis, acne, ringworm, athlete's foot, burns, cuts, poison ivy and varicose ulcers; would act on surface skin irritations as a stimulant and would increase circulation and aid in healing; would be efficacious to inhibit the spreading of skin irritations and to restore the normal skin surface; and would be efficacious to kill or check disease germs".

The false and misleading claims on count three have already been stated.

We will assume for purposes of argument that the drugs described in the first two counts are efficacious in the treatment of psoriasis.

But, are they efficacious in the treatment of acne?

Are they efficacious in the treatment of eczema?

Are they efficacious in the treatment of varicose ulcers?

Will the capsules (Count II) taken internally prove efficacious in the treatment of athlete's foot?

Will they restore the normal skin surface?

Will they kill or check disease germs?

We will further assume for purposes of argument that the ointment described in Count III is efficacious in the treatment of hemorrhoids and piles.

But, does the label on the package bear an accurate statement of the quantity of the contents in terms of weight or measure?

The statute above quoted (Section 352 (a)) says a drug shall be deemed to be misbranded if its labeling is false or misleading in *any particular*.

It therefore follows that if the evidence shows beyond a reasonable doubt that the drugs herein involved *will not do any one* of the things just stated in question form, appellants are guilty.

This requires a detailed review of the evidence.

The Interstate Shipment.

At the outset appellants stipulated that they, *the defendants*, did introduce and deliver for introduction into interstate commerce the drugs alleged to have been so introduced into interstate commerce in the three counts of the information (Tr. 15-17).

Witnesses Buell and Yakowitz.

Witness Buell, after being eminently qualified as a chemist of fifteen years experience, testified that the Colusa Natural Oil and the oil in the capsules is a crude petroleum oil which does not contain sulphonated hydrocarbons, has no alkaline action, is not

a natural alkaline oil, is not a sulphonated solution, has no camphor or turpentine and contains .75 of 1 per cent of total sulphur, and that the ointment described in count III is a light brown ointment consisting essentially of zinc oxide, benzocaine, camphor, menthol, crude oil and lanolin or beeswax (Tr. 20). He also testified that there were no iodine compounds (Tr. 19) or ichthyol (Tr. 33) present in the drug and that it had no astringent effect at all (Tr. 33).

This testimony was corroborated by that of Mr. Yakowitz, another equally qualified chemist, who supervised the work of Buell (Tr. 33-39).

Appellants object to this testimony, not because it is scientifically incorrect, for they could not produce a single chemist, even from Texas, who could or would testify otherwise, but because, as the Court and jury had every right to infer, it proved that their chemical claims as to these products were false.

This testimony conclusively proves that the following claims of appellants *are false*:

1. That the drugs contain sulphonated hydrocarbons (a substance found in ichthyol) (Tr. 20).
2. That it is a natural alkaline oil (Tr. 23).
3. That it is an astringent (Tr. 23).
4. That it has an alkalizing action (Tr. 23).
5. That it carries 4% iodine, 3% ichthyol, and a trace of camphor and turpentine (Tr. 27).

Appellants object to the fact that the tests to determine the presence of camphor and turpentine were

made by the sense of smell, yet as the uncontradicted testimony of Mr. Buell shows this is the *best* available test.

Appellants also object to the fact that the oil was not tested by the process of fractional distillation employed in the petroleum industry. This objection is without merit and if appellants felt that such a test would prove the Government's chemist wrong, they had every opportunity to put their own chemists on the stand to contradict them.

In short, the testimony of the Government chemists laid the foundation upon which to predicate the questions propounded to the Government's medical witnesses and established that the oil in question did not possess chemical properties (such as those found in ichthyol) upon which beneficial therapeutic claims could be based.

Dr. Anna Mix.

Doctor Anna Mix, a chemist for the Food and Drug Administration since 1918, testified that her duties consist in the examination of food and drugs to determine their radioactivity, that she has made hundreds of such tests, and that her examination of Colusa Natural Oil disclosed no evidence of radium emanations or radioactivity (Tr. 40).

Appellants would have us believe that her testimony is immaterial and has no place in this case, yet the labeling (newspaper mat) claims that Colusa Natural Oil contains radium emanations which are "taken up in the blood stream, and as quickly as

lightning, goes to all parts of the body *where it kills or checks disease germs*" (Tr. 27). This is an extravagant claim without the slightest foundation, and is the basis of the Government's charge that the oil is misbranded because it *will not check or kill disease germs*.

Mary Smith and Nicholas Leone.

Mary Smith and Nicholas Leone, eminently qualified bacteriologists, as their record of training and experience shows (Tr. 42, 45, 47), testified that they tested Colusa Natural Oil to determine its germicidal, antiseptic and inhibitory properties and found *none* (Tr. 42, 45).

They made forty tests, which were standard laboratory tests made by the Food and Drug Administration, of materials claimed to be antiseptic or germicidal (Tr. 42, 43, 46, 48). True, they used only two organisms, the typhoid organism and the staphylococcus aureus (common pus-forming organism), which is an organism that has a standard resistance. These tests established that the oil *will not kill or check disease germs*, not necessarily the germ that causes psoriasis, if a germ does cause this disease. The claim of appellants is that the oil will kill or check disease germs and since no specific disease germ is named, the statement in the labeling constitutes a claim that the oil will (because of the radium emanations) kill or check disease germs generally. This testimony of Mary Smith and Nicholas Leone is uncontradicted (no bacteriologist took the stand for ap-

pellants) and conclusively proves the labeling false in one very definite particular,—*and alone calls for a verdict of guilty under the Federal Food, Drug and Cosmetic Act.*

Dr. Maurice K. Tainter.

Dr. Maurice K. Tainter testified that he is a professor of pharmacology at Standard University and a physician and surgeon, graduated from Stanford Medical School in 1925, is a member of all local, national and international societies relating to his profession and has published many articles here and abroad dealing with new drugs and their uses. (Tr. 50-51.) He further testified that he is familiar with petroleum oils as a pharmacologist and that it is one of the compounds the use of which he teaches medical students and doctors. (Tr. 51.) He further testified that Colusa Natural Oil is not an astringent, has no iodine, no radioactivity or radium emanation, is not irritating to the skin, has no camphor or menthol, has no smell of turpentine (Tr. 51) and has no distinctive properties or materials which could be recognized as having medicinal power. (Tr. 53-54.)

He further testified that the oil has no alkalizing action, no healing qualities, would not be efficacious in the treatment of psoriasis, eczema, acne, athlete's foot, poison ivy, or varicose ulcers, is undesirable for burns and cuts, will not act as a skin stimulant, will not increase the circulation of blood, and will not restore the skin surface. (Tr. 54.) With relation to radium emanations, the transcript of record on page 54 shows as follows:

“The statement that ‘the emanation is taken up in the blood and as quick as lightning, goes to all parts of the body where it kills or checks the disease germs’ is not true. Any amount of radiation which would be sufficient to kill disease germs will be enough to kill the body. The tissues of the body are more sensitive to radiation than are the germs.”

With relation to ointment mentioned in count three, he testified as follows:

“The salve or ointment would not be a competent or good treatment for hemorrhoids. It might be palliative in relieving itching; it might help the itching temporarily, but would not cure the condition. The benzocaine would relieve the itching.”
(Tr. 55.)

On cross-examination Dr. Tainter testified that he was not a dermatologist (Tr. 59-60), had never treated the skin diseases mentioned in the information and had made no clinical test, excepting an animal test with rabbits and a test to his person from which he determined that Colusa Oil had no irritating effect on the delicate membranes of the eyes of rabbits or on his own skin. (Tr. 60.)

This testimony of Dr. Tainter clearly shows that Colusa Oil will not act on surface skin irritations as a stimulant, and standing alone proves the oil to be false in *another particular* which justifies a verdict of guilty. His testimony also proves that the oil will not kill or check disease germs from radium emanation.

So we repeat, even if the oil is efficacious in the treatment of psoriasis, which we do not admit, we have up to this point introduced conclusive evidence that its claims are false in at least *two particulars*.

Dr. James W. Morgan.

Dr. James W. Morgan testified that he is a surgeon of the rectum and colon and a specialist in that field, is a graduate of the University of Pennsylvania, has taken postgraduate work in New York and London, is a member of recognized medical societies and has written articles for medical journals. (Tr. 65.) He testified that in his opinion (given the ingredients of Colusa Hemorrhoid Ointment as established by the chemists) the ointment would not be beneficial in the treatment of hemorrhoids. (Tr. 66.) He admitted, on cross-examination, that he had never seen or used the Colusa Hemorrhoid Ointment, and that his opinion was hypothetical. (Tr. 66.) He further admitted that specialists in his field have varying views (Tr. 67), and on re-direct, he stated:

“I think this ointment from this jar would do more harm than good in the treatment of hemorrhoids; it might relieve temporarily some of the symptoms. Zinc oxide ointment as such is always irritating to the perianal skin and should never be used.”

This testimony, if believed by the jury, would in and of itself justify a verdict of guilty on the third count on the alleged claims that the ointment is efficacious in the treatment of hemorrhoids and piles. *However the second claim of misbranding on the*

third count, to-wit, that its label did not bear a statement of the quantity of the contents in terms of weight or measure, is clearly and conclusively proven and permits but one, and only one verdict—guilty.

Dr. Harry John Templeton.

Dr. Harry John Templeton, a specialist in dermatology and syphilology, with an eminent background of training and experience (Tr. 68-69), testified that in his opinion Colusa Natural Oil (given its ingredients) would not be efficacious in the treatment of acne, psoriasis, athlete's foot, ringworm or eczema. In fact he voiced the opinion that it would be harmful in the treatment of acne, poison oak and poison ivy. (Tr. 69.) True, he testified on cross-examination that he never used the oil in his practice and made no clinical tests with it. True, he also stated that "Psoriasis is a very difficult disease and I know no cure for it". (Tr. 70.) The effort of appellants to limit the value of Dr. Templeton's testimony to psoriasis, clearly shows the limited scope they are endeavoring to give the evidence in this case. But they cannot escape the doctor's conclusions as to acne, athlete's foot, poison ivy, ringworm and eczema, and if the jury believes the oil not to be efficacious for *any one of these*, then the Government has established its case, for we repeat, a drug is misbranded if it is *false or misleading in any particular*.

Dr. George V. Kolchar.

Dr. George V. Kolchar testified that he is a physician specializing in dermatology and syphilology, and

has acted as clinical instructor in these two subjects at Stanford University since 1934. The evidence discloses that he too is a man of eminent training and experience. (Tr. 70.) He testified that in his opinion Colusa Oil would not be efficacious in the treatment of eczema, acne, poison ivy, ringworm, athlete's foot, psoriasis, and varicose ulcers. His testimony relative to eczema and acne discloses:

“Eczema comes in more than one form and the form of eczema would very definitely determine the character of the treatment or medication. You cannot have one specific medication that is good for treatment of eczema. The determination what should be used in the treatment of eczema depends upon a knowledge of the particular character of the eczema involved and that calls for a diagnosis by a skin specialist.

I am familiar with the composition of Colusa Natural Oil as recited by you. Bearing in mind its composition, as related by you, it is my opinion that the application of this oil would not be efficacious in the treatment of eczema; I think it would have a deleterious effect and an aggravating effect on acne; it would make it worse * * *.” (Tr. 71.)

He further testified that Colusa Oil would not act as a stimulant on the skin, would not inhibit the spread of skin irritation and would not restore normal skin surface. (This fact corroborated by appellants' own witness, Dr. Vincent.) He also testified that radium emanations are not used in the treatment of skin diseases and said that it is not true that “radium emanation is accepted as harmoniously in

the body as is sunlight by the withering plant" and with relation to radium emanations said:

"Radium is subject to regulation and control; you must have the proper dosage applied in the proper manner; radium is an extremely dangerous element; it is stored in the bones; it destroys blood cells; it destroys certain vital glandular tissue; its improper use will lead to certain diseases of the blood which are fatal. The deposition of radium in the bone in the form of salts will lead to necrosis, by which I mean, the killing of the cells of the bone." (Tr. 73.)

True he admitted that he does not profess to be an expert on psoriasis, however this admission does not detract from his testimony relative to the efficacy of the oil in the treatment of eczema, acne, poison ivy, ringworm, athlete's foot and varicose ulcers.

Dr. Frederick A. Fender, an eminently qualified surgeon and clinical instructor in surgery at Stanford Medical School, testified that Colusa Oil would not be efficacious in the treatment of varicose ulcers whether applied externally or taken internally. He further testified that in his opinion the oil would not be good in the treatment of burns or cuts. He further testified that the ointment (count III) would not shorten the course of hemorrhoids, nor cure or improve them. His testimony, standing alone, is sufficient to warrant a conviction for false claims as to varicose ulcers on counts I and II and false claims as to hemorrhoids on count III. (Tr. 75-77.)

After reading into the record the contents of Government's Exhibit No. 6, appellee rested.

THE DEFENSE EVIDENCE.

The defense called up as its witnesses, satisfied users of the products in question.

Frank Fazio testified that he received splendid results from the use of Colusa Oil applied externally in the treatment of *psoriasis*. (Tr. 77-79.)

Dr. William G. Woodman, an osteopath, testified that while he is not a dermatologist and does not treat skin conditions and refused to treat *psoriasis*, he had successfully treated some patients with Colusa Oil and that he had not treated a case where he received unfavorable results. He admitted using a quartz light in connection with the treatment of one Mathew. (Tr. 80-82 and 85.)

Donald R. Crawford testified that he had *poison oak*, was given shots by a physician which brought about a reaction and that thereafter he used Colusa Oil which gave relief and enabled him to heal up this condition within a week to ten days. (Tr. 83-85.)

Henry N. Stabeck testified that he treated *stomach ulcers* successfully with Colusa Oil and treated *athlete's foot* successfully by the external application of Colusa Oil, but in that connection said that *he cleaned his foot every day* and rubbed the oil on both morning and night. (Tr. 85-87.)

Mrs. Josie Alice Mead testified that she had suffered from *psoriasis* for many years and had been unsuccessfully treated by various skin specialists, including Dr. Kolchar, the Government's witness, and that by the use of Colusa Oil and Colusa Oil capsules,

she was able to effect an almost complete cure in four weeks. (Tr. 87-89.)

Mrs. Teresa L. Loughran, aged sixty-two, testified that she successfully used Colusa Oil in the treatment of *varicose ulcers*, but admitted that because of a weak heart she had been bedridden and under a rest cure and taking digitalis for seventeen months. (Tr. 89-90.)

Mrs. Agatha Devlin Harless testified that she had *eczema* and had been treated therefor by several doctors including Dr. Kolchar, and that she received no beneficial results until she used Colusa Oil. (Tr. 91.)

Mrs. Rena Gerlach testified that she suffered from a skin disease, the nature of which she did not know, and that after unsuccessfully treating with doctors and other remedies, she finally used Colusa Oil, which cured her in three weeks. (Tr. 92.)

Howard Everett, aged seventy-five, testified that the ointment covered by count III gave him greater relief than any other product with which he treated for *hemorrhoids*. However he did not claim to be cured of his hemorrhoids. (Tr. 93-95.)

Miss Evelyn Marie Costello testified that she had a skin disease known as *eczema*, for which she was treated at Mayo Clinic and with several doctors without effecting a cure, and that several months before the trial she began using Colusa Oil, which has helped her very much and given her relief. (Tr. 109-110.)

Marco Sablich testified that Colusa Oil gave him more relief for *psoriasis* in five weeks than he got in fifteen years treatment with doctors. (Tr. 110-111.)

Miss Adele Davis testified that she suffered from *eczema* for five years and used many remedies and consulted doctors without beneficial results. She further testified that she used Colusa Oil which gave her immediate relief and said "Really, to me it was magic". (Tr. 111-112.)

Dr. Gilbert Mead, a chiropractor, testified he suffered a severe burn two weeks before the trial, used Colusa Oil, and that within half a minute the stinging ceased. (Tr. 112.)

Mrs. Opal Cameron testified that she had *eczema* off and on from the time she was a youngster and that she got relief from Colusa Oil, which cleared up her condition. (Tr. 157-158.)

Mrs. Wilma Welch testified she had a mild affliction of *athlete's foot* and that she obtained instant relief by the use of Colusa Oil. (Tr. 158.)

Arthur W. Scott, a former employee of appellant Colgrove and a welder in the shipyards, testified that Colusa Oil was beneficially used by him in treating a severe burn and a cut. (Tr. 158-160.)

The three remaining witnesses for appellants were Dr. W. T. S. Vincent, Dr. C. E. Von Hoover and appellant Walker Colgrove.

Dr. W. T. S. Vincent, seventy-eight years of age, a practicing physician from Texas, testified that he took preliminary work from his father, then attended the University of Cincinnati for two years, graduating in 1889 (Tr. 96); that he took no post graduate work and is not a member of any medical societies (Tr. 102); and that he is "a specialist in blood, geni-

tal, urinary and dermatology” and operates a clinic in Houston under the name of “Wage Earners’ Clinic”, formerly known as “Dollar Medical Clinic”. (Tr. 103.)

In the course of his fifty-two years practice he treated practically all skin diseases and has used Colusa Natural Oil in the treatment of his patients hundreds of times. (Tr. 97.) He described his successful treatment by the use of Colusa Natural Oil of one Carl Alsobrook and one Dalkins, both terribly afflicted with *psoriasis*. (Tr. 97-99.) He also claimed successful use of this oil in the treatment of *athlete’s foot*, *acne* and *varicose ulcers*. (Tr. 99.) He stated that Colusa Natural Oil quickly mitigated the itching and pain incident to the skin diseases about which he testified (Tr. 100) and that it had a very fine penetrating effect into the skin and accomplishes restoration of new skin. (Tr. 100.) His statement “I know it is the best treatment I have ever used” (Tr. 100) was an expressed firm conviction of the efficacy of the oil in the treatment of *psoriasis* and not of all the various and assorted cases of skin diseases as claimed by appellants. He also found Colusa Natural Oil efficacious in healing varicose ulcers and found the Colusa Ointment efficacious *in relieving the discomfort and irritations of hemorrhoids*, but made no claim that it cures hemorrhoids. He further said:

“It is my opinion that Colusa Natural Oil is efficacious to relieve discomfort and pain incident to these skin diseases referred to in the information, and it will inhibit the spread of skin irritations and restore the normal skin surface. It is

my further opinion that this oil acts on the surface of skin irritations as a stimulant and increases circulation and aids in healing.” (Tr. 102.)

As for his cross-examination appellants say:

“The witness was subjected to a lengthy cross-examination, but none of his testimony with respect to these various cases treated by him with Colusa Natural Oil was in any manner impeached or weakened. To the contrary, he demonstrated, on this examination, a wide knowledge of these skin diseases and reemphasized the effectiveness of these Colusa products in the treatment of such diseases.” (Appellants’ Opening Brief, p. 21.)

With this conclusion we cannot agree, as an analysis of his cross-examination will show. On direct examination he spoke of the homeopathic and allopathic schools of medicine and the great differences between the two (Tr. 100-101), yet on cross-examination he admitted that he had never studied anything about homeopathy (Tr. 105). He said that Colusa Natural Oil had ichthyol content and that he knew this by its odor (Tr. 106), yet he admitted he had no chemical analysis of Colusa Oil made (Tr. 105), and his testimony in this regard was directly in conflict with that of the Government chemists, who chemically analyzed the oil and found *no* ichthyol present. Certainly they, as chemists, are better qualified to testify as to its ichthyol content. This bit of testimony clearly evidenced the readiness of Dr. Vincent to testify favorably to petitioner, even when his testimony was without scientific basis or foundation. He admitted treat-

ing one Guidry for acne (Tr. 106) and his testimony with regard to this person is interesting and enlightening. He testified as follows:

“Q. In the case of Guidry, you prescribed a diet, because you thought that condition was necessary to his treatment of acne?

A. Yes.

Q. What was the medication you prescribed?

A. Nothing except cleansing.

Q. What other treatment?

A. No other treatment.

Q. None, whatsoever?

A. No.

Q. You are positive?

A. I don't remember giving him any other treatment.” (Tr. 106-107.)

As against this we have the testimony of Guidry:

“I reside in Houston, Texas; I took treatment for acne; I visited Dr. Vincent, who has been a witness here.

Mr. Zirpoli. Q. How long did you go to him and were you in his care with relation to treatment for acne?

A. Well, about eight or ten months, I imagine; something like that.

Q. Did he at any time use Colusa Oil in the treatment of you?

A. Yes, sir.

Q. And in treating you with Colusa Oil did he do anything else or prescribe anything else?

A. What do you mean, the treatment I was given?

Q. Yes.

A. I was given something else besides that.

Q. What did he do besides give you Colusa Oil at that time?

A. He put me on a diet and he used shots.

Q. Injections?

A. Injections.

Q. In your bloodstream?

A. Yes, sir.

Q. In other words, where? In your arm?

A. In my arm and back.

Q. Did you observe any change in your condition of acne from the use of Colusa Oil?

A. No, sir.

Q. Did you observe any change for the better?

A. I can't see where it helped me." (Tr. 264-265.)

Guidry then went on to testify that a good while after he had seen Dr. Vincent he learned that by watching his diet his condition improved and that he got beneficial results from one Dr. Gandy, who gave him radium treatments and placed him on a strict diet. (Tr. 265-266.)

Dr. Vincent further said with relation to Guidry:

"Mr. Zirpoli. Q. Doctor, you say that he has those scars and he has those indentations as a result of this acne vulgaris?

A. He has.

Q. Is that correct?

A. It is.

Q. In other words, Colusa Oil, then, did not restore the natural skin surface over where the scars were and the indentations were, did it?

A. I would like to answer that in some way besides Yes and No.

Mr. Gleason. Go ahead; you can answer.

Mr. Zirpoli. Q. I know; *but did or did not it restore the natural skin surface?*

A. *It couldn't do it, nor any other remedy.*"
(Tr. 261.)

This last admission of the Doctor not only weakened his testimony but corroborates the testimony of the Government's doctors and *conclusively* proves that Colusa Natural Oil *will not restore the natural skin surface*. The claim of appellants that Colusa Natural Oil will restore the normal skin surface is therefore *false* and *alone* justifies a verdict of guilty of misbranding (in any particular) on counts I and II.

Dr. C. E. Von Hoover. In view of appellants' contention that the trial Court committed prejudicial errors in connection with the testimony of this witness, that testimony is set forth in detail in a subsequent portion of this brief wherein these alleged errors are discussed. (See pp. 36-59, *infra*.) However, this testimony should be considered together with the evidence heretofore stated in passing upon the sufficiency of the evidence to warrant a conviction.

Chester Walker Colgrove. In view of appellants' contention that the trial Court committed prejudicial errors in connection with the testimony of this witness, that testimony is set forth in detail in a subsequent portion of this brief wherein these alleged errors are discussed (see pp. 65-73, *infra*), and should be considered together with the evidence heretofore stated in passing upon the sufficiency of the evidence to warrant a conviction.

REBUTTAL EVIDENCE.

Homer H. Baumgartner testified that appellee's Exhibit "O" in evidence is a photograph of his hands and his signature. He related that he went to see Mr. Colgrove at the suggestion of his dentist and that by using Colusa Natural Oil in conjunction with an electric lamp for twelve days the condition of his hands improved to the extent shown by the second photograph of his hands, appellee's Exhibit "O". However, he testified that at the time of the second photo the palms of his hands were still sore and that the condition returned until at Easter time they were just like a piece of beefsteak. He further testified that his hands are now better and that he has not treated with Colusa Oil since the first treatments during the twelve day period covered by the photograph. (Appellee's Exhibit "O".) True, on cross-examination, he testified as follows:

"Dr. Lilliquist gave me the lamp the next morning after I saw Colgrove; the oil and the lamp did the work, relieving me for the time being from the itching and torment; I then had had this disease for sixteen years; I previously had gone to doctors, but they had not cured this disease; they did not give me as much relief as I got from Colusa Oil; with the oil and lamp together I got relief for a short period; I never tried the lamp alone before nor since." (Tr. 263.)

However, the significant thing about his testimony is the fact that the declarations contained in the affidavit prepared by Mr. Colgrove and executed by him to the effect that

“Colusa Natural Oil—used externally—and Colusa Natural Oil Capsules—taken internally—are the only treatments I used in clearing up this terrible condition in Twelve Days as pictured above.

(Signed) HOMER H. BAUMGARTNER.”

(Tr. 24.)

are not true. He did not take the capsules internally and he did use *an electric lamp*.

Amos Guidry. The testimony of this witness has already been reviewed in the observations heretofore made of the testimony of Dr. Vincent. (See pp. 30-32, supra.) Apparently the only treatment that benefited this witness was his diet and he concluded his testimony by saying that the condition of his face was *worse* in appearance when he *left* Dr. Vincent than it was at the time of his appearance as a witness. (Tr. 266.)

Harry Y. Anderson testified that he used Colusa Natural Oil for eczema for about a week, applying it twelve times, and observed no improvement, that it did not stop the itching, that he had this condition for two weeks before using the oil and the condition went away in about three weeks after using a home remedy of sulphur and lard. (Tr. 266-267.)

Mrs. Mary Ellen Hosford. This witness testified that she used Colusa Oil in July and August of 1941 for psoriasis on her legs and arms without beneficial results. She first applied it morning and night, but it made her legs too sore and she was forced to reduce its use to once a day, and finally to once every two

or three days for about a month and a half until she had used practically all of the bottle. She then went to the druggist, told him it did not help her at all and got her money back. (Tr. 267-269.)

William Milne, who had varicose ulcers for about twenty-five years and tried various doctors and many remedies, tried Colusa Natural Oil for about two and a half weeks without improvement. (Tr. 270-271.)

The above, with certain unimportant exceptions, constitutes the evidence introduced by both appellee and appellants.

Does that evidence establish the guilt of appellants beyond a reasonable doubt on all three counts of the information?

The Federal Food, Drug and Cosmetic Act (21 USCA, Section 352(a)) provides that a drug is misbranded "if its labeling is false or misleading in *any particular*" (not *every* particular).

No effort will be made to review all the particulars in which the drugs involved were claimed to be misbranded.

As for count one, the evidence is uncontradicted that Colusa Natural Oil will not restore the natural skin surface and that it will not kill or check disease germs. Proof of either of these calls for a verdict of guilty on this count.

As for count two, the evidence conclusively shows that Colusa Natural Oil capsules taken by mouth are not efficacious in the treatment of athlete's foot

(or for that matter, any of the other skin diseases), will not restore the natural skin surface, and will not kill or check disease germs. Again proof of any one of these calls for a verdict of guilty.

As for count three, a simple reading of the label discloses that it does not contain "an accurate statement of the quantity of the contents in terms of weight, measure or numerical count". (21 USCA, Section 352(b)(2).)

In the face of the clear and explicit language of the Federal Food, Drug and Cosmetic Act, that a drug is misbranded if its labeling is false or misleading in any particular and is misbranded if in package form unless its labeling bears an accurate statement of the quantity of the contents in terms of weight, measure or numerical count, citation of authorities sustaining a verdict of guilty on the evidence in this case on all three counts is unnecessary.

In concluding on the sufficiency of the evidence to sustain the verdict we invite the Court's attention to the accepted rule that the verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.

Glasser v. United States, 115 U. S. 60, 81.

NO PREJUDICIAL ERROR WAS COMMITTED BY THE TRIAL COURT IN CONNECTION WITH THE TESTIMONY OF DR. C. E. VON HOOVER OR THE OTHER WITNESSES.

Dr. C. E. Von Hoover testified as to his studies and qualifications as a Doctor of Science in Pharmacology

and Pharmaceutical Chemistry and stated that he is the director of a clinical testing agency in San Antonio, Texas, that is partially owned by himself and the clinical staff, *who do all the actual application of physiological tests.* (Tr. 113.) He further testified that he used the Pharmacopoeia of the United States in his studies (Tr. 113) and in that connection his testimony further shows:

“Mr. Gleason. Q. Let me digress for one moment: Do the men in the pharmaceutical profession have what I term a dictionary? Mr. Doyle terms it a bible.

A. We have a Pharmacopoeia No. 11; and we have the Homeopathic Pharmacopoeia.

Q. What are those Pharmacopoeiae?

A. They are the laws of dosages for internal and external medicines of every nature.” (Tr. 115.)

He further said:

“In my clinic I have the *medical clinician, the M. D., the one that diagnoses, the one that prescribes, the one that applies or gives the particular medicine.* Dr. Beal is one of my assistants; he is acting superintendent and U. S. Public Health Officer. He is Assistant United States Surgeon, and in charge of the various public health matters, including immigration matters, in San Antonio. [In addition to Dr. Beal, I have Dr. A. R. Burchelmann, M. D., he is the examiner and former Health Officer of San Antonio, and past Trustee of the American Medical Society. I also have Major Burby, retired Trustee of the American Veterinary Association, who is my veterinary consultor in the small animal practice.” (Tr. 116.)

The following is a detailed statement of the testimony of Dr. Von Hoover relative to certain tests, observations and conclusions made by him in the use of Colusa Natural Oil:

“Yes, we made clinical tests in our laboratory and clinic of Colusa Natural Oil and Colusa Hemorrhoid Ointment.

Q. Without going into details, I want to find out, first, what you did generally in order to test this remedy.

Mr. Zirpoli. You will have to bring in the doctors that made the test. You cannot take a man who is not a physician and surgeon, and who is not competent.

Mr. Gleason. This man's business is to test drugs.

I made tests of Colusa Natural Oil as a pharmacologist and I have the reports. I also tested the oil on animals. I am not a veterinarian, but I am a graduate of veterinarian life science.

Q. Did you test the oil on human beings?

A. Yes.

Q. First describe the tests that you made of this oil in its application to animals.

Mr. Zirpoli. I object. He is not qualified to make an application of medication upon animals, or upon humans, and he is not qualified to treat animals or humans.

The Court. Proceed.

Mr. Gleason. Q. Briefly describe, Doctor, the test.

A. We had tests with a——

Mr. Zirpoli. I object again on the ground this man is not competent to testify.

The Court. In the interest of time I will allow it.

A. I tested it with a parasital agency of the product in canine dermatology.

In this canine dermatology, the follicular mange attacks the roots of the hair. We submit the demodectic folliculum to the microscope in a plate. There are five stages, from the egg to the mature bug. We put them under the microscope to see if they are alive; then we immersed them in this oil and put them away in a germ proof place. In an hour or two we bring them back and put them under the microscope. Yes, I personally did all this. The purpose of this is to determine the germicidal agency, and, if any, parasital. Yes, to determine whether or not this oil would apply to the mange condition of a dog, and whether or not it would destroy it. In these tests of Colusa Oil, I personally observed under my microscope that from the egg to the mature bug, these were dead; we tried this on a number of dogs. Yes, this is the practice we follow in testing for Bauer & Black, Goodman, and the rest of our clients.

Q. Now, with respect to the test that you said you made on human beings, tell us what you did with respect to the testing of Colusa Natural Oil on human beings.

Mr. Zirpoli. I submit he is not competent to administer oil to human beings as medication, and this is not proper evidence. It is incompetent, irrelevant, and immaterial. He has no right to treat anyone.

The Court. I will limit it to what he did, himself.

With respect to these tests on human beings, I reported these findings to the clinicians to assure them of the safety; we had psoriasis, athlete's foot and the different types of eczema. A case

record was made out. With the physician we select the patient, and the physician diagnoses the the patient. I am with the physician. He dispenses the oil, a sufficient amount for two or three days and the patient returns to the clinic.

Mr. Zirpoli. Under those circumstances, the doctor is the only competent witness.

The Court. I have limited the testimony and I instruct the jury it is limited to what this witness has done, if anything, himself, in relation to this test, so-called. Proceed.

We procured our patients from the Robert Greene charitable clinic. Yes, I saw the patients, absolutely. I observed their condition. I personally took scrapings of skin from the patients in athlete's foot cases and tested them under the microscope, and if it was a true case of athlete's foot, we used Colusa Oil for treatment.

I first learned of Colusa Oil through a patient at this clinic who had a difficult psoriasis case.

Our clinical testing of Colusa Natural Oil lasted over a period of several months, beginning in April, 1942 and lasting until about June 9th.

Q. In the course of this clinical test, in charity clinics, and in your laboratory, how many cases of psoriasis were tested with Colusa Oil by you?

Mr. Zirpoli. I object to that as incompetent, irrelevant, and immaterial. This man is not competent to testify as to psoriasis. I object to that.

Mr. Gleason. We submit two things: first, this man had to study *Materia Medica*, and the diseases of the skin, and he is as competent as a practicing physician.

The Court. The testimony shows that he kept the case history. What else did he do? The record is clear on that matter.

A. I personally take the scrapings from the skin and subject them to the microscope and ascertain their constituents. Yes, in the course of these years of study I have told you about I did study skin diseases.

Q. Did you study the literature and existing knowledge of psoriasis and eczema, and all other skin diseases?

A. All doctors of science are very much interested in literature, and we read all the literature on psoriasis.

Mr. Zirpoli. May I ask that go out?

The Court. It may go out.

Mr. Gleason. Is that a part of your training?

A. It is a part of our required course.

Q. After the oil was applied in the clinic, did you observe its effect upon the patient?

A. Yes.

Mr. Zirpoli. I object to his observation of the effect of a medication on a patient. He is not competent to testify to the effect of a medication on a patient.

Mr. Acton. I don't like to argue after your Honor has ruled, but the law is, I think, your Honor, that a man may observe a person, and may know that a person is undergoing a certain type of medication, because he is undergoing it right in his own home, or in his laboratory.

Mr. Gleason. Q. Did you see the Colusa Natural Oil applied to people who had psoriasis in this clinic?

A. Yes.

Mr. Zirpoli. Just a moment, I object to that. He is not competent to testify they had psoriasis.

The Court. Objection sustained.

Mr. Zirpoli. There are methods of proving those things by bringing proper witnesses.

Mr. Gleason. Did you see that ointment, Doctor, applied to people who had skin diseases?

A. Yes.

Mr. Zirpoli. The same objection. He is not competent to testify they had skin ailments.

The Court. I will allow the question and answer to stand. Let us get through with this witness.

I observed one hundred clinical tests from the Burchelmann Clinic and twenty-five from the U. S. Public Health by Dr. Beal. We have the clinic and Dr. Beal or Dr. Burchelmann is always present in the clinic all the time. We have but one clinic, a big clinic, where we put the material in, one hundred patients at a time. Dr. Beal, Dr. Burchelmann and myself are all present. We are always in the clinic together.

I remember the case of a Mr. McDonald, 809 South Alto Street, who is a fairly representative case. He had schizo-rubra eczema in his hand for about twenty years; that was treated with Colusa Oil.

Mr. Zirpoli. I object to any testimony with relation to the character of the disease.

Yes, I caused a photograph to be made of this patient's skin trouble. This photograph was then marked Defendants' Exhibit F for identification. This photograph is of the hand of J. R. McDonald; he was treated with Colusa Oil; this photograph was taken before starting treatments.

The witness was then shown another photograph which was marked Defendants' Exhibit G for identification; that photograph shows Mr. Mc-

Donald's hand after completion of treatment with Colusa Oil.

I remember Mrs. A. Nelly of San Antonio, Texas; she was a housewife, seventy years of age, who had a varicose ulcer.

Mr. Zirpoli. I object to all of this testimony, first of all, as hearsay, as to her age, and his conclusion and opinion as to her having a varicose ulcer. He is not competent or qualified to testify to that. It may be the fact, but nevertheless, he is not the proper witness for it.

Mr. Gleason. We submit, if the Court please, the statement that any man who has studied the *Materia Medica* and who has studied the diseases and taken the necessary and prescribed courses to obtain the degrees this man has, is competent to testify as to whether or not a given condition is a varicose ulcer, or eczema.

The Court. I will allow him to answer with the hope we will get through soon.

A. Mrs. A. Nelly is the varicose ulcer.

The Court. How do you know?

A. Well, from my experience, your Honor, in the laboratory, and as a doctor of science, and from the knowledge I have of *Materia Medica*, and dermatology and therapeutics, I determine that.

The Court. By observation.

A. By observation, yes sir.

The Court. That is what you base your testimony on?

A. That is what I base my testimony on, yes sir.

The Court. All right, proceed.

Mr. Gleason. May I have this picture marked next in order for identification?

Thereupon the photograph was marked Defendants' Exhibit H for identification.

Mr. Zirpoli. May I ask one other foundational question?

The Court. You may.

Mr. Zirpoli. You are not a pathologist, are you?

A. No, sir, I am not a pathologist.

Mr. Zirpoli. Now I object to his conclusion as to the woman having a varicose ulcer on that further ground.

The Court. I will sustain the objection and instruct the jury to disregard the testimony.

Mr. Gleason. May we have an exception?

The Court. You may have an exception.

Mr. Gleason. In any event, Mrs. Nelly was suffering from a skin ailment?

A. Yes.

I am now looking at Defendants' Exhibit H for identification which I recognize as a photograph of Mrs. Nelly's leg with this invasion in it, if you want to call it that, if I am not permitted to call it a varicose ulcer; she was treated with Colusa Oil in the course of my clinical testing, which I previously have described. I personally observed and watched the case, and on the seventeenth day she returned to the clinic and I caused another photograph to be made to show the progress.

At this point, Mr. Gleason asked another photograph be marked Defendants' Exhibit I for identification. This photograph, Defendants' Exhibit I for identification, shows the right foot and part of the leg of Mrs. Nelly, taken seventeen days after her first admission and treatment in the clinic.

Thereupon, Defendants' Exhibits H and I for identification were admitted, in evidence, over objection, as Defendants' Exhibits H and I.

Thereupon, Defendants' Exhibits F and G for identification were offered in evidence and were admitted, over objection, as Defendants' Exhibits F and G.

Yes, approximately one hundred twenty-five cases of skin diseases of various kinds were treated in this clinical testing laboratory, and Colusa Oil was used in these treatments.

Q. Were any cases of psoriasis treated in that clinical testing laboratory?

Mr. Zirpoli. I object to that; he is not competent to testify as to any cases of psoriasis, or their treatment.

The Court. Objection sustained.

I have had occasion in the course of my professional training at various colleges and in my practice to study skin diseases, and particularly psoriasis; I have studied dermatology; I have had occasion to study the eczema family of which there are forty types. I have studied varicose ulcers. As a result of my training in dermatology, and as a result of clinical testing work in my professional practice, I can identify these various diseases when I see them.

Q. You tested, as I remember, one hundred twenty-five cases. How many cases of psoriasis were included in that group?

Mr. Zirpoli. I object to that, your Honor, again, as this man is not competent to testify to that.

The Court. If he knows, he may answer.

A. Twenty.

Mr. Gleason. How many cases of eczema, approximately?

Mr. Zirpoli. The same objection.

The Court. The same ruling.

A. Forty, altogether.

Mr. Gleason. How many cases of athlete's foot?

A. Well, I believe eleven or twelve cases.

Yes, my wife suffered from a skin disease; she had a fungus infection from the ground from working in the yard. It attacks the nails; it is caused from the trichophyton that gets imbedded into the skin and works its way in and causes itching; it turns the nails dark. I saw an opportunity of trying out this Colusa Oil and I used it on her.

Here Mr. Gleason asked that a photograph be marked 'J' for identification, and another be marked 'K' for identification, and they were so marked by the clerk.

The witness was then shown Defendants' Exhibit J for identification, and testified it was a photograph of the hands of his wife, Mrs. C. E. Von Hoover.

I caused the photograph to be taken and it depicts the condition of Mrs. Von Hoover's hands as they were about the middle of March, 1942, before I used Colusa Oil in their treatment. It was a hard case, taking weeks to recover. Yes, the Colusa Oil cleared the hands; there was no sign of the infection.

The witness was shown Defendants' Exhibit K for identification, and testified: this is the photograph of the hands of my wife after concluding four weeks' treatment with Colusa Oil, and it accurately portrays the condition of her hands at that time.

Defendants' Exhibits J and K were then admitted in evidence, over objection, and marked Defendants' Exhibits J and K.

Yes, I observed the use of Colusa Natural Oil on a man named Mercurlin, who met a premature death. He was a deputy sheriff.

Q. What skin disease did he have, Doctor?

Mr. Zirpoli. I object to that on the ground that this witness is not qualified to testify to that.

The Court. Objection sustained.

Mr. Gleason. Q. Do you know what disease he had?

Mr. Zirpoli. The same objection.

The Court. The same ruling.

Mr. Gleason. Q. He had a skin disease, did he, Doctor?

A. He did.

Q. On what part of his body?

A. On the right arm.

Mr. Zirpoli. I ask that the answer go out. He is not competent to testify.

Mr. Doyle. We will take a ruling of the Court.

The Court. Proceed.

Scaling appeared and then blood exuded. I observed those conditions; Colusa Oil was used in treatment. No, I did not observe the results of the use of this oil in this case because he met a premature death, being killed by a lawyer.

Mr. Gleason. Q. What is your opinion, Doctor, based upon the many tests made by you in your laboratory and in these clinics, and based upon your training as a pharmacologist, and based on your studies of the science of pharmacology, what is your opinion as to the efficacy of Colusa Oil in the treatment of psoriasis?

Mr. Zirpoli. I want to interpose an objection, your Honor.

The Court. Objection sustained. Proceed.

Mr. Gleason. Note an exception, if your Honor please.

The Court. Let an exception be noted.

Mr. Gleason. Q. Doctor, what is your opinion, based on the tests that you have made, and on your training as a pharmacologist, your observations of the use of Colusa Natural Oil on persons suffering from skin diseases, what is your opinion as to the efficacy of the product in the treatment of such diseases?

Mr. Zirpoli. I want to make my objection for the record, that this man is incompetent to testify to the efficacy of it.

The Court. I am going to try to get through with this witness. He may answer it.

A. Yes, it is an effective treatment.

Q. What did you observe as to what it accomplishes, Doctor?

Mr. Zirpoli. The same objection. This is an incompetent witness.

The Court. He may answer.

A. The results were good.

I found this oil had penetrating powers by rubbing the epidermis briskly for two minutes, and it will show under the microscope on the follicles of the hair, and by this I found it penetrates.

If a homeopath consults me as a pharmacologist, naturally I resort to the homeopathic pharmacopoeia; or if the allopath consults me, I resort to the allopathic pharmacopoeia for the doses.

Q. With respect to these homeopaths, have you had occasion to check and determine what the homeopaths describe as a dose of sulphur?

A. For the homeopath pharmacologist, you see, the percentage, the metric system isn't used by the homeopaths. They use a potency in the *Materia Medica*, which is equivalent to the metric system, or percentage, and as to grains. For instance, I may say, if you want gelsenium, or sulphur, the homeopath ointment would be a 12 potency, equal to about 1/10 of a grain, or a per cent. If it is a question of allopathy, in the regular school of medicine, there is your *Pharmacopoeia* that says two per cent is effective. We must say, as pharmacologists, as to both schools that consult us. Therefore we have two books.

Yes, based on my training as a pharmacologist, and as a man who tests drugs, and based upon my study of subject, and based upon my observation of the use of Colusa Natural Oil, it is my opinion that this Colusa Oil is efficacious to relieve discomfort and pain, and that it is efficacious to inhibit the spread of skin irritation over the normal skin surface." (Tr. 117-130.)

Thereafter appellants sought to introduce in evidence two reports on the use of Colusa Oil in both animal and human therapy. Appellee's objections to the introduction of these reports in evidence were sustained, and in view of the record, properly so. The record in that connection discloses the following:

"At the end of my three months' clinical investigation of Colusa Oil to determine the efficacy of this preparation, I prepared a report which covered both the animal and human therapy; I personally prepared the clinical findings and report and I have that report here with me.

At this point, the Court permitted Mr. Zirpoli to ask questions of the witness who thereupon testified:

I prepared these reports on the 28th day of May, 1942; they were prepared by me; *I referred to the reports of doctors and physicians in our clinic; we make up our case record which is signed by the physician.*

I personally observed each and every case referred to in the report; and I was present in the clinic when this oil was administered to the patients. This investigation was started around April 1st and completed May 28th. At the time of completion of the investigation, I sat down and typed this report covering the results of it; *I relied only on the case records*, the actual facts there of the patient; these records are kept in our clinic; these case records have been made available to the Federal Food and Drug inspectors in connection with this case; ever since the adoption of the Food and Drug Act, these inspectors have examined our records. This report is based on my knowledge of the cases referred to.

Mr. Zirpoli again was permitted to examine the witness, who continued:

My secretary and I wrote these case reports in the presence of the physician, and I personally examined each of the cases on which we have a record and on every one of the days the patient appeared. I was with the physician when these reports were made. *I am not a medical doctor; I am a pharmacologist; I rely on the medical doctor in the matter of treatment.*" (Tr. 131-132.)

* * * * *

"Mr. Gleason. Q. Dr. Von Hoover, do you have in your possession at the present time an

original memorandum made by you of the facts as to your observations of these various diseases, psoriasis, eczema, athlete's foot, impetigo, varicose ulcers, poison ivy or oak, and hemorrhoids, as to which you and *your associates* made a clinical investigation?

A. Yes.

Q. And that report was prepared by you, was it not?

A. Yes.

Q. And are the facts there set forth in that report, facts that you personally observed and ascertained in this clinical investigation?

A. Yes.

At this time the report was marked Defendants' Exhibit L for identification." (Tr. 133.)

It will be noted that Exhibit L for identification is signed as follows:

"J. W. BURBY, D.V.S.,
Director
(Former Major U. S. Army
Veterinary Corps.)
Broadway Veterinary Hos-
pital & Clinic
San Antonio, Texas.

Member: American Veterinary Medical Association. State Association, County & State Veterinary officer.

Micropis & Laboratory:

C. E. VON HOOVER
M.S.D.Sc.

Subscribed and Sworn to Before Me, this 9th day of June A.D. 1942.

J. Reynolds Flores
Notary Public,
Bexar County, Texas." (T. 138.)

The witness was then shown Exhibit M for identification. It will be noted that this report is signed as follows:

“A. BERCHELMANN, M.D.,
Clinician.

Member: American Medical Association. Bexar
County Medical Society, Selective Service Administration.

Former: House Physician Santa Rosa Hospital,
City Health Officer, San Antonio, Texas. Capt.
U. S. Army Medical Corps.

C. E. VON HOOVER,
M.S.Dsc. Phd.
Chemistry and Laboratory
and Technical Assistant
to the Clinician.

Subscribed and Sworn to before me this the
28th day of May A. D. 1942.

J. REYNOLDS FLORES
Notary Public,
Bexar County, Texas.” (Tr. 144-145.)

In connection with these exhibits the record shows as follows:

“Mr. Gleason. I will ask that a report entitled, ‘Some clinical experiments with a sulphonated hydrocarbon oil’ be marked for identification.

Whereupon the document was marked Defendants’ Exhibit N for identification.

Mr. Gleason. Q. You have given me several reports, Doctor. Defendants’ Exhibit L for identification, without stating its contents, is what?

A. It is my report.

I prepared it; that is my report of the results of the application of Colusa Natural Oil to the

skin of animals; *associated with me was Dr. Burby, a veterinarian.*

The witness was again questioned by Mr. Zirpoli.

I am not a veterinarian.

Mr. Zirpoli. Q. And this is a veterinarian's report:

A. You see my name on the other side as the laboratory man, on the other side there, the man that made the findings in the presence of the veterinarian. He couldn't make those tests because he is not qualified in bacteriology.

Q. You made the microscopic and laboratory tests?

A. That is correct.

Q. And he made all the veterinarian tests with relation to treatment?

A. *I am not a veterinarian. I do not apply medication.* In that case I did; it did not involve the practice of medicine.

Q. This report is predicated upon the experiments conducted upon the animal?

A. That is correct.

Q. *Made by Dr. Burby?*

A. *And myself.*

Q. But Dr. Burby did the actual administration?

A. No, I administered to some dogs the application of oil in his presence.

Q. This purports to be his conclusion as a veterinarian, too, does it not?

A. Canine dermatology is the practice of the veterinarian, and, naturally, *he would sign as the veterinarian*, and I as the scientist, the micrologist.

Mr. Gleason. Q. I am going to ask you to refer to Defendants' Exhibit L for identification and ask you if that document refreshes your recollection as to facts observed by you in these clinical tests on animals as to the therapeutic value and power of the Colusa Natural Oil?

A. Yes.

Q. Please state briefly the facts observed by you in these clinical tests on this animal therapy as to the results of the use of Colusa Natural Oil on skin diseases of animals. And, Doctor, confine yourself to the facts that you know of your own knowledge and do not read any of the opinions if they are opinions of Dr. Burby.

Mr. Zirpoli. I want to make this objection, your Honor. He is asked to testify as to the effect of the application of this oil, which calls for his opinion and conclusion as a veterinarian.

The Court. Objection sustained.

Mr. Acton. Will your Honor allow us an exception to that ruling?

The Court. Note an exception.

Mr. Gleason. Q. Doctor, in the practice of your profession as a pharmacologist and your work for these firms that you mentioned yesterday, including the Goodman Laboratories and the rest of them, as their consultant, do you in the practice of your profession resort to animal therapy to test the efficacy of drugs and preparations?

A. Yes.

Q. Is that a part of the ordinary practice of the ordinary pharmacologist?

A. That is the practice.

Q. I will ask you to state, Doctor, the facts that you observed, in your clinical examinations;

that is to say, this animal therapy, from the use of Colusa Natural Oil upon the skin diseases of dogs and cats used in this animal therapy.

Mr. Zirpoli. May it please the Court, I submit that the question is identical in different terms and the objection is made exactly as it was made to the last question.

Mr. Doyle. This question asks for the knowledge of the witness.

The Court. The objection will be sustained.

Mr. Acton. May we have an exception to the ruling?

The Court. Note an exception.

Mr. Zirpoli. May I have the record also show that my objection is on the ground that it is irrelevant and immaterial to the case.

The Court. Let the record so show.

Mr. Gleason. Q. Doctor, I will ask you to refer to Defendants' Exhibit M for identification. Did you personally prepare that report?

A. Yes.

Q. What is it?

A. It is a report of the clinical results of oil on the physiological tests on human patients.

Q. Those are the one hundred and some-odd patients you mentioned yesterday afternoon?

A. This contains a hundred, this report.

This report contains the essential facts which I observed in the making of these tests with Colusa Natural Oil on those one hundred patients.

Q. Does this report, Doctor, contain a statement of the facts observed by you in these clinical tests made by you and your associates in your presence, on human beings, to ascertain the therapeutic value of Colusa Natural Oil in the treat-

ment of psoriasis, athlete's foot, impetigo, varicose ulcers and hemorrhoids?

A. Yes.

Q. And also acne? I omitted acne.

A. No, I don't believe we tested it on acne.

Q. You are right, Doctor, you did test for poison oak and ivy?

A. Yes.

Q. Now then, will you, by reference to this report——

Mr. Zirpoli. May I ask some foundational questions before I interpose any objections? *This report also purports to be the report of Dr. A. Berchelmann, M.D., clinician, is that correct?*

A. Yes.

Q. *And this report also purports to show the effects and results secured by the treatment of these human persons by the physician and surgeon, is that correct?*

A. Yes.

Mr. Zirpoli. Then, your Honor, I submit that the witness is incompetent to testify as to the facts herein contained on the grounds that it is not exclusively the information of the witness, and on the further ground that it contains hearsay testimony predicated upon hearsay facts of a physician and surgeon, a person other than himself, and on the further ground that he is not competent as a physician and surgeon to testify as to the effect and results.

The Court. Same ruling. The objection will be sustained.

Mr. Acton. May we be allowed an exception to the ruling?

The Court. Note an exception.

Mr. Gleason. You testified yesterday as to your opinions and conclusions as to the efficacy of this drug in the treatment of these various diseases. Did you investigate in these tests on human beings to determine the toxic effect of the preparation?

A. I make the toxic test before it is submitted to clinicians. That depends on me.

Mr. Zirpoli. We will admit that it is not poisonous, counsel.

Mr. Gleason. Not toxic?

Mr. Zirpoli. Yes, poisonous; toxic means poisonous, I think. There is no issue as to that.

Mr. Gleason. Q. And in the cases personally observed by you in these clinical tests, in any of these cases did you observe any unfavorable or injurious results from the use of Colusa Natural Oil on these patients?

Mr. Zirpoli. Objected to as calling for an opinion and conclusion, your Honor, of this witness, who is not a physician and surgeon.

Mr. Gleason. That is his business, if your Honor please, and profession; he tests drugs.

The Court. The objection will be sustained.

Mr. Acton. May we note an exception to that ruling?

The Court. Note an exception." (Tr. 145-151.)

Thereafter on cross-examination Dr. Von Hoover testified as follows:

"I am a Doctor of Science; I am not a physician and I am not a veterinarian; I operate a clinical investigation agency; *I do bacteriology*; that is incorporated in my Doctor of Science degree. I am permitted to practice bacteriology. *Colusa Oil was never tried out as a germicide; we*

did not make any germicidal test. In determining if a product has germicidal properties, I would submit it to the staphylococci germ test, the streptococci test; to bacteriological tests.” (Tr. 151.)

Incidentally it might here again be observed that one of the false claims alleged in the labeling was that Colusa Natural Oil kills and checks disease germs. This was clearly established by appellee, and appellants admitted, by the above statement, that they made no germicidal tests, thereby leaving the record uncontradicted and conclusive of the appellants’ guilt as to this claim, which we repeat in and of itself calls for a guilty verdict.

Dr. Von Hoover then testified that he uses United States Pharmacopoeia No. 11 and said “We rely on the pharmacopoeia absolutely; I wouldn’t say it is our Bible, it is our law.” He further said it was the one used in his studies in Europe (Tr. 151). Yet he could not tell us how much iodine is in tincture of iodine (Tr. 154), and said that the amount of sulphur prescribed by the pharmacopoeia for a sulphur ointment is 5 and 10 per cent (Tr. 154). Page 424 of the Pharmacopoeia was introduced in evidence and it provides: “Sulphur ointment contains not less than 13.5% and not more than 16.5% S—meaning sulphur” (Tr. 272).

The witness after testifying that his investigation of mange covered the “full range starting with the egg and ending up with the full grown grub” went on to classify it as *vegetable origin* (Tr. 156), an obvious, simple and conclusive indication of his gross incompe-

tence as a witness. And being further pressed about athlete's foot and its classification as a fungus, he testified as follows:

"Q. How about athlete's foot?

A. It is fungus, *Trichophyton microsporum*.

Q. Do you know whether that is vegetable or animal?

A. That is vegetable.

Q. Do you know what schizomycetes are?

A. That is animal.

Q. That is one of the primary classifications, isn't it?

A. Fungus.

Q. You say it is animal, and a moment ago you told us that fungi are vegetable.

A. Fungus is a growth. It is from the earth. It could be classed as vegetable. Certainly it is vegetable. *As I told you, I am not a bacteriologist; I only make these investigations of my own accord.*

Mr. Zirpoli. That is all.

Mr. Gleason. That is all, Doctor." (Tr. 156-157.)

Thus we have a man who endeavors to create the impression that he knows bacteriology "I do bacteriology * * * I am permitted to practice bacteriology", admitting his limitations when pressed on the subject. With this record before us, can it be said that the trial Court committed prejudicial error in excluding portions of the testimony of Dr. Von Hoover—we think not.

At the outset we wish to stress the fact that although Dr. Von Hoover is neither a physician nor a

veterinarian, he was actually allowed to invade the expert realm of both. He testified as to the tests made with Colusa Natural Oil in canine dermatology (Tr. 118), to the results obtained from the treatment of skin diseases of his wife (Tr. 126-127), J. R. McDonald (Tr. 122-123) and a Mrs. Nelly (Tr. 124-125), and finally he gave testimony with respect to the chief matter in issue at the trial, to-wit, the efficacy of Colusa Natural Oil in the treatment of skin diseases. He testified that in his opinion Colusa Natural Oil "is an effective treatment" for persons suffering skin diseases and that the results obtained from its use were good (Tr. 129). He further found that the oil had penetrating powers when applied on the skin (Tr. 129) and that "it is efficacious to inhibit the spread of skin irritations over the normal skin surface."

In view of Dr. Von Hoover's incompetency to testify as to these matters the trial Court in the exercise of its discretion committed no error when it would not permit further testimony from this witness on clinical reports (human and animal) based upon findings of a physician and a veterinarian.

No proper foundation was laid for the admission of Exhibits L, M and N in evidence. They represented the findings of persons other than himself and were clearly hearsay and opinioned evidence which they alone were qualified under the circumstances to give.

The right to pass upon the qualifications of Dr. Hoover as an expert in those matters with relation to which his testimony was excluded, rested entirely in the discretion of the trial Court, and if the trial Court

was not satisfied as to his qualifications, it had a perfect right to exclude his testimony.

The rule is well stated in

Wigmore on Evidence (3rd Ed.), Volume II, section 561(2), "Discretion of Trial Court":

"Secondly, and emphatically, the *trial Court must be left to determine*, absolutely and without review, the fact of possession of the required qualification by a particular witness. In most jurisdictions it is repeatedly declared that the decision upon the experimental qualifications of witnesses should be left to the determination of the trial court."

The pertinent rule followed by the Federal Courts was lucidly stated in

Morton Butler Timber Co. v. United States, 91 Fed. (2d) 884, at 886 and 887 (C.C.A. 6th, 1937):

"The rule is settled that the decision of the trial court, with respect to whether a witness called to testify to any matter of opinion has such qualifications and knowledge as to make his testimony admissible is conclusive unless clearly shown to be erroneous in matter of law. (Cases cited.) The finding of the trial court on a question of fact, upon which the admissibility of evidence depends, will not be reversed on appeal, if the finding is fairly supported by the evidence. (Cases cited.)"

In *Clark v. Hot Springs Electric Light & Power Co.*, 55 F. (2d) 612, 615 (C.C.A. 10), it was held that the competency of an expert is a preliminary question resting in the discretion of the trial court, and its decision in the absence of a plain error of law, serious mistake of fact, or

abuse of discretion, will not be disturbed. (Cases cited.)”

In the case of

Hamilton v. Empire Gas & Fuel Co., 297 Fed.
422, at page 430 (C.C.A. 8th),

the Court said:

“The decision as to the qualifications of an expert witness is peculiarly within the province of the trial court, and should not lightly be set aside. The trial court has a reasonable discretion in passing upon such qualification which will be respected by the Appellate Court in the absence of a clearly erroneous ruling. (Cases cited.)”

This broad latitude of discretion invested in the trial Courts has been upheld and approved by the United States Supreme Court in a number of cases. In

Spring Company v. Edgar, 99 U.S. 645, at 658, the Court said:

“Cases arise where it is very much a matter of discretion with the Court whether to receive or exclude the evidence; but the Appellate Court will not reverse in such a case, unless the ruling is manifestly erroneous. (Cases cited.)”

Again, in

*Stillwell and Bierce Manufacturing Company
v. Phelps*, 130 U.S. 520, at 527,

the Court said:

“ * * * Whether a witness called to testify to any matter of opinion has such qualifications and knowledge as to make his testimony admissible is a preliminary question for the judge presiding at the trial; and his decision of it is conclusive, unless clearly shown to be erroneous in matter of

law. *Perkins v. Stickney*, 132 Mass. 217, and cases cited; *Sorg v. First German Congregation*, 63 Penn. St. 156."

The following appears in the decision of

Inland and Seaboard Coasting Company v. Tolson, 139 U.S. 551, at 559:

"The ground of the exclusion of the question appears to have been that the judge was not satisfied of the qualifications of the witness as an expert upon the subject inquired of. Whether a witness is shown to be qualified to testify to any matter of opinion is always a preliminary question for the judge presiding at the trial, and his decision thereon is conclusive unless clearly erroneous as matter of law,"

and in

Chateaugay Ore and Iron Company v. Blake, 144 U.S. 476, at 484,

the Court said:

"* * * How much knowledge a witness must possess before a party entitled to his opinion as an expert is a matter which, in the nature of things, must be left largely to the discretion of the trial court, and its ruling thereon will not be disturbed unless clearly erroneous. (Cases cited.) * * * We think the ruling of the trial court in excluding his (the witness's) opinion was right; at any rate, it cannot be adjudged clearly erroneous."

Bradford Glycerine Co. v. Kizer, 113 Fed. 894, C.C.A. 6,

involved an appeal from a verdict rendered in a tort action arising out of personal injuries sustained by

the plaintiff when certain nitroglycerine exploded as a result of the defendant's alleged negligence. The Court in dealing with the propriety of the trial judge's exclusion of testimony of an expert offered by the defendant said (p. 896):

“ * * * The other question was properly excluded on the ground that the witness was not shown to be qualified to answer it. He was a well-shooter, and had had considerable experience, but it was not shown that he had peculiar knowledge of any chemical action that might be produced by the sun's rays upon the substance in the wagon. It was urged that his long experience in handling nitroglycerine and assisting in its manufacture qualified him to express an opinion, but such qualification is a question for the trial judge, and its determination is very largely in his discretion. * * * .”

The short answer to the impressive list of authorities cited in the appellants' brief is that none of them bears on the specific issue involved in the principal case. The narrow question, it appears, is this: Did the Court abuse its discretion? Were its rulings so clearly erroneous, to the prejudice of the appellants, that the conscience of the Appellate Court will be shocked? Can these questions be answered in the affirmative after reading the so-called expert's testimony on cross-examination when a searching light was cast on the knowledge he had of relevant scientific matters?

Dr. Von Hoover's extensive claims of scientific background are discredited by the record and much of the testimony (reports) he sought to give was clearly

hearsay and represented the opinions and findings of persons other than himself.

The trial Court in its sound discretion had a right to require that the appellants' evidence in the expert field be of equal competence to that adduced by the Government. The appellants were not prejudiced. According to Dr. Von Hoover himself, there were in his laboratory and clinic able and competent medical doctors who diagnosed the ailments of the patients, dispensed the appellants' product, and observed the results therefrom. Also, a veterinary participated in making the tests on animals. These professional gentlemen could have been called and qualified as expert witnesses for the appellants. In the final analysis this situation falls within the category as stated in

Spring Co. v. Edgar, supra,

“Cases arise where it is very much a matter of discretion with the Court whether to receive or exclude the evidence.”

From the record in this case and the foregoing authorities it should be obvious that no prejudicial error was committed by the trial Court in connection with the testimony of Dr. Von Hoover.

Chester Walker Colgrove testified that he is one of the defendants in the case and is engaged in the business of producing and marketing Colusa Natural Oil (Tr. 161). He then testified as to the beneficial results secured by one Walter Litholand by using Colusa Natural Oil in treating a skin disease of the hands (Tr. 163-164). He also testified as to the beneficial results secured in treating the diseased condition of the

hands of one Homer H. Baumgartner and in connection with this testimony Exhibit "O" was introduced in evidence (Tr. 164-168). He also testified that he successfully used Colusa Natural Oil in the treatment of an eczema spot on himself and observed the penetrating power of the oil (Tr. 168). The Government then objected to the introduction in evidence of a letter marked Exhibit "P" for identification and was sustained in the objection (Tr. 171-175). This letter had no bearing upon the issues before the trial Court and merely went to the good faith or lack of criminal intent of Colgrove, neither of which appellee submits are elements involved in the crimes charged in the information.

The witness then testified that he personally did not have anything to do with the mailing of the ointment, in interstate commerce, and that he did not know that the ointment was being shipped with the particular labels on the bottles that were in fact there and that when he discovered that such labels were going out he destroyed the rest of them and ordered corrected labels. (Tr. 175-176.)

Appellee then asked "that that all be stricken out as irrelevant and immaterial" and the Court said that "the objection will be sustained" (Tr. 176). A further objection to his testimony that he had ordered that "3/4 of an ounce" be placed on the labels was sustained (Tr. 176).

The record then discloses the following:

"Mr. Gleason. Q. In the information, Mr. Colgrove, there is a statement set forth, 'Colusa

Natural Oil is credited by other users with producing relatively as remarkable results as above pictured in relieving irritation of external acne, eczema, psoriasis, athlete's foot or ringworm, poison ivy, varicose ulcers, burns and cuts.' You have been marketing this oil for approximately two or three years, as I recall your testimony. Upon what did you base this statement that is contained in this information, the statement just read?

Mr. Zirpoli. I object, your Honor, it is irrelevant and immaterial as to what he based it on; all that matters is the fact that the statement is there and the statement speaks for itself.

Mr. Gleason. In this information are various statements quoted from the advertising matter. Counsel has submitted to your Honor instructions that we desire to argue to the effect that if any false statement is contained in any portion of the advertising matter, the mats or otherwise, that this man can be convicted. We desire to show the truth of this statement. We desire to show that when Mr. Colgrove said that 'Colusa Natural Oil is credited by other users' he was telling the truth, and we desire to submit to your Honor hundreds of testimonials in regard to this product received from users by the defense.

The Court. Testimonials cannot go into evidence here.

Mr. Gleason. I don't want you to think I am going contrary to your ruling. I make the statement, I make it as an officer of this court, that I believe under this information, under settled principles of law—

The Court. You may believe whatever you see fit.

Mr. Gleason. May I present the law to your Honor on that subject?

The Court. No, we will proceed. You make your offer of proof, and you have a record to protect you, and I will rule.

Mr. Gleason. Q. Mr. Colgrove, in the course of your marketing of this product, can you tell us the number of sales that have been made of this product to people throughout the United States?

A. Many thousands of them.

Q. You sold your product on a money-back guarantee, did you not?

A. Yes.

Q. Can you tell us how many of the people to whom you sold this product throughout the United States availed themselves of the opportunity to receive their money back?

Mr. Zirpoli. I object to that as irrelevant and immaterial, and a form of negative proof. I object to it.

The Court. The objection will be sustained. We are not here concerned with any money-back guarantee. There is no issue involved in this case about money or money back for any sales. Let us proceed.

Mr. Acton. Will your Honor allow us an exception to the last ruling?

The Court. Certainly.

Mr. Gleason. Then we make the offer of proof and that will conclude this subject. We offer to prove the following facts by this witness at this time:

First, that from persons to whom this preparation was distributed by these defendants throughout the United States, hundreds of testimonials,

the originals of which are here available for inspection and we have gone to the trouble of copying them—hundreds of testimonials, voluntary testimonials, have been received by this company and by this defendant.

We further offer to prove that this product was marketed and distributed to these thousands of persons under a money-back guarantee if not satisfied, and that out of the thousands of people to whom that guarantee was made, approximately two per cent availed themselves of the guarantee.

We further offer to prove, if the Court please, the truth of the statements contained in this information. We offer these testimonials, and these testimonials will prove the truth of the statements that 'Colusa Natural Oil is credited by other users with producing relatively as remarkable results as above pictured in relieving irritation of external acne, eczema, psoriasis, athlete's foot or ringworm, poison ivy, varicose ulcers, burns, and cuts,'—the statement contained at lines 13 to 16 and page 3 of this information and reincorporated by reference in later portions of the information. And we offer those facts, if the Court please, as being relevant, pertinent and competent in the proof of the issues involved in this case.

Mr. Zirpoli. If I might respectfully submit, your Honor, as I have heretofore had occasion to state in arguing various points before the Court, that there was no element of fraud or bad faith involved; it is a simple case of misbranding, and that therefore testimonials are not admissible in evidence. Had this been a fraud case, then the position taken by counsel would have been a proper one, but this is a misbranding case and not a case predicated upon fraud or fraudulent intent.

The Court. The exception will be sustained.

Mr. Doyle. Exception if your Honor please.

The Court. Certainly.

Mr. Gleason. At this time, if the Court please, simply to complete the record, we desire to have the original testimonials marked for identification.

Q. To get a preliminary foundation, you have handed me, Mr. Colgrove, a file containing various papers. Did you prepare that file?

A. No, sir; those letters were written by individuals.

Q. I mean, did you put these into the file?

A. Yes, sir.

Q. What are they?

A. Voluntary testimonial letters received from purchasers of Colusa Natural Oil products.

Q. And you personally know that these are voluntary testimonials sent into the office?

A. Yes, sir.

Thereupon, Mr. Gleason offered these original testimonials in evidence.

Mr. Zirpoli. Same objection; irrelevant and immaterial.

The Court. Same ruling.

Mr. Gleason. May they be marked, then, for identification?

The Court. Let them be marked for identification.

The proffered testimonials were then marked Defendants' Exhibit Q-1 for identification."

These testimonials appear on pages 181-250 of the Transcript of Record.

This was followed by the following evidence:

“Mr. Gleason. Q. You heard me read, Mr. Colgrove, a statement from the information in this case with respect to other users crediting various and sundry things, a statement contained in some of the advertising matter. Upon what did you base that statement?

Mr. Zirpoli. Same objection; irrelevant, incompetent and immaterial.

The Court. Objection sustained.

Mr. Doyle. I desire an exception, if the Court please.

The witness continued:

Yes, I made a very thorough investigation before engaging in the marketing of this product; I talked with users of the oil; engineers, people who had sold it previously to my knowledge of it, or having heard of it; and it had the reputation of a real miracle product.

Mr. Zirpoli. Your Honor, I ask that the witness' statement about its reputation go out.

The Court. Let the miracles go out, ladies and gentlemen of the jury, and disregard it for any purpose in this case.

Mr. Gleason. Do you have available, Mr. Colgrove, the statement upon the basis of which these statements were incorporated in the newspaper mat with respect to the efficacy of radium through the body. Can you give counsel the authorities from which that was procured?

A. Yes, sir.

Mr. Zirpoli. I object to that. Authorities as given by this witness are irrelevant and immaterial.

Mr. Doyle. May he answer the question, if your Honor please?

The Court. What question?

Mr. Doyle. The question as to the source from which he obtained this statement which appears quoted in the mat. It appears as quoted.

The Court. It matters very little the source of the information or where it came from. We are not concerned with the source of it.

Mr. Doyle. Exception, if your Honor please.

It was here stipulated that if Miss Nelson, representative of the firm which printed the labels, were called she would testify this was a mistake on the part of her printing firm; and that in the printing of the labels involved in the Third Count in this case, the designation '¾ of an ounce' was inadvertently omitted from the labels, and that Mr. Colgrove, as manager of the defendant company had previously sent said printing firm a letter, marked here as Defendants' Exhibit P for identification, which was received by the McCoy Label Company; and that within a week of this time, Mr. Colgrove had the label company correct this inadvertence and put upon the label the designation '¾ of an ounce'. Will that be so stipulated?

Mr. Zirpoli. Subject to the objections heretofore made that it is irrelevant and immaterial.

The Court. Objection sustained.

Mr. Gleason. An exception, if the Court please.

The Court. Very well.

Mr. Gleason, at this time, to complete that record, offered in evidence Defendants' Exhibit P for identification, which is the letter Mr. Colgrove previously referred to.

Mr. Zirpoli. We make the same objection. It was offered once before, and I object again that it is irrelevant and immaterial.

The Court. Objection sustained.

Mr. Doyle. May we have an exception?

The Court. Exception." (Tr. 250-253.)

On cross-examination the witness was questioned over objection of his counsel as to his previous business connections and experience (Tr. 253-254) and he was also questioned over objection of his counsel as to a letter, appellants' Exhibit 13, wherein the letters "MD" appear in what purports to be a typewritten copy of a letter signed by Dr. William G. Woodman (Tr. 254-259). This testimony was elicited solely for the purpose of testing the credibility of the witness (Tr. 255).

Appellants contend that the trial Court committed several errors in connection with the testimony, to-wit:

Appellants contend that the trial Court committed prejudicial errors in connection with the testimony of Mr. Colgrove:

- (1) When it refused to permit the introduction of appellants' testimonials in evidence;

- (2) When it refused appellants the right to show that the omission of certain quantitative designations from the label involved in the third count was inadvertent;

- (3) When it refused appellants the right to show the source from which certain statements with relation to radium emanations were secured;

- (4) When it refused to permit appellants to show that less than two per cent of the purchasers

of its drugs availed themselves of appellants' money-back guarantee;

(5) When it refused to permit appellants to show that they at times distributed their products on a "gratitude price offer" and free of charge to hospitals, doctors and persons unable to pay for the same;

(6) When it permitted appellee to cross-examine Mr. Colgrove on his past business background and experience and the so-called testimonial letter of Dr. Woodman.

All of these matters excepting the last (6) involve questions of appellants' knowledge, intent or good faith in the distribution of their products, elements which have absolutely nothing to do with the issue involved.

The Federal Food, Drug and Cosmetic Act of June 25, 1938 (Section 333(a) and (b) of Title 21 U.S.C.A. 3,

provides:

"Any person who violates any of the provisions of section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than \$1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than \$10,000, or both such imprisonment and fine."

“Notwithstanding the provisions of subsection (a) of this section, in case of a violation of any of the provisions of section 331, with intent to defraud or mislead, the penalty shall be imprisonment for not more than three years, or a fine of not more than \$10,000, or both such imprisonment and fine.”

The information in this case is charged under subdivision (a). Had it been charged under subdivision (b), the intent, knowledge or good faith of the shipper would have been material, but under subdivision (a) an interstate shipment of a misbranded drug is a misdemeanor regardless of the intent, knowledge or good faith of the shipper.

United States v. 13 crates Frozen Eggs, 215 F. 584 (CCA-2);

Sprague v. United States, 208 F. 419 (D.C.);

Strong, Cobb v. United States, 103 F. (2d) 671 (CCA-6);

United States v. Dr. David Roberts etc., 104 F. (2d) 785 (CCA-7);

United States v. 11¼ Dozen Packages, etc., 40 F. Supp. 208;

United States v. 6 Devices, etc., 38 F. Supp. 236;

United States v. Buffalo Pharmacal Co., 131 F. (2d) 509 (CCA-2).

Furthermore the testimonials were clearly hearsay as was the fact that less than two per cent of the purchasers of these products availed themselves of the money-back guarantee.

See

Goldstein v. United States, 63 F. (2d) 609 (CCA-8);

United States v. 11¹/₄ Dozen Packages, etc., *supra*.

On source of appellants' information see

United States v. John S. Fulton Co., 33 F. (2d) 506 (CCA-9).

It is therefore evident that the trial Court properly excluded the testimonials, evidence of inadvertent omissions of quantitative designation from label, source of information placed in newspaper mat, evidence of fact that less than two per cent of purchasers asked for money back, evidence of gratitude price offer and free distribution to certain institutions and persons, since all of these could possibly pertain only to appellants' good faith and lack of criminal intent.

As for the cross-examination of Mr. Colgrove, appellee had a perfect right to examine him as to his past activities and to test his credibility in connection with the copy of letter of Dr. Woodman, initialed "MD" (either inadvertently or intentionally).

ALLEGED ERROR IN CONNECTION WITH TESTIMONY OF DR. TAINTER.

Without again reviewing the qualifications of Dr. Tainter, it suffices to say that as a pharmacologist, professor and physician he was competent to testify as to the effect to be expected from the use of this oil in the treatment of poison ivy and any difference he

may have noted in it from crude petroleum oil. The foundation previously laid for these questions was more than ample.

THE ALLEGED UNFAIRNESS OF THE TRIAL COURT.

The alleged unfairness of the trial Court consists in the judge's comments during the testimony of

(1) Dr. Vincent, "Proceed, let us get through with this witness" (Tr. 99);

(2) Dr. Von Hoover, "Let us get through with this witness" (Tr. 122), "I will allow him to answer in the hope we will get through soon" (Tr. 123), and "I am going to try to get through with this witness" (Tr. 129);

(3) Mr. Colgrove, "We are not concerned here with what you are interested in" (and in fact under the issues we were not) (Tr. 161) and "Let's get through with this witness", and

(4) Mr. A. W. Scott, "Is that all from this witness?" (Tr. 159).

These appear to be rather trivial matters upon which to predicate a charge of unfairness upon the part of the trial Court, particularly when we bear in mind the length of the trial, and if they were improper comments, they certainly were harmless. See

Glasser v. United States, 315 U.S. 60, 82;

United States v. Lee, 107 F. (2d) 522.

However, this Honorable Court should not consider this point, as appellants' rights were not saved. At no

time did appellants object to these comments of the Court.

The United States Supreme Court in the case of
Drumm-Flato Commission Co. v. Edmisson, 208
 U.S. 534,

said at page 540:

“Plaintiffs in error finally complain as ground of error of certain remarks by the court which, it is contended, were prejudicial. The Supreme Court (Territory of Oklahoma) replied to this assignment of error that no objection had been taken to the remarks complained of. Counsel now say that to have made objection would have made ‘a bad matter much worse’. But we cannot accept the excuse. We have examined the remarks complained of, and we do not think they had the misleading strength that is attributed to them. At any rate, it was the duty of counsel to object to them, and if then the court made matters worse, or did not correct what was misleading or prejudicial, its action would be subject to review.”

In

Lane v. Leiter, 237 Fed. 149 (C.C.A. 7th), at
 158 and 159,

the Court said:

“Complaint is made of certain remarks of the trial judge in the presence of the jury; but as the record does not show objection or exception to the remarks at the time the matter is not reviewable. (Cases cited.)” .

This rule was again recognized in

Panama R. Co. v. Strobel, 282 Fed. 52 (C.C.A. 5th),

when the Court said (p. 53):

“No objection was made or exception noted during the trial to the remark of the court to counsel, and hence no error now assigned as to it can be considered by this court. (Cases cited.)”

A case directly in point was decided by the Circuit Court of Appeals for this circuit. It is

Wolf v. Edmunson et al., 240 Fed. 53 (C.C.A. 9th, 1917).

In that case the propriety of the trial judge's comment on a line of inquiry was in issue. Objection was made to the admissibility of the evidence, but not to the trial Court's statement. After discussing the harmlessness of the statement the Court said (p. 57):

“* * * However, as there was no objection to this statement by the court when it was made, and no exception taken to it at the time, it must be treated as wholly without merit.”

**ALLEGED ERROR IN CONNECTION WITH THE TESTIMONY
OF MR. EVERETT AND MR. COLGROVE.**

The alleged error in connection with the testimony of Mr. Everett as to his conclusion concerning a friend who had used these products was at most harmless and he was not precluded from giving a physical description of the man. However, counsel for appellants declined to further pursue this line of testimony for the

record further shows (to conclude the testimony quoted on page 73 of Appellants' Opening Brief) that after Mr. Zirpoli had said "He was thin", counsel for appellants stated "That is all—*never mind that*—that is all" (Tr. 95).

The alleged error in connection with the testimony of Mr. Colgrove pertained not to the case of Baumgartner but to that of Walter and in that connection to conclude the testimony quoted on page 74 of Appellants' Opening Brief the Court said:

"He may state what he observed at any time and place himself",

and the witness went on to say

"I observed Walter's bitterness had turned to great relief and joy, etc."

This certainly shows a willingness on the part of the Court to permit the witness to testify to the fullest extent as to his actual observations. The Court under the circumstances properly exercised its discretion and permitted the witnesses to testify not as to their conclusions but to the physical facts they saw.

INSTRUCTIONS OF THE COURT.

A review of the Court's instructions in their entirety (Tr. 274-292) will show that the jury was properly instructed as to all the elements involved in the case.

Appellants' first objections are to the following instructions given by the trial Court:

“The sole and remaining question for you to determine from the evidence in this case is whether or not the drugs covered by the three counts of the information were misbranded as alleged by the Government. If you are satisfied from the evidence beyond a reasonable doubt that the articles of drug bore statements in their labeling or accompanying circulars or newspaper mat that were false or misleading in any particular in which they are alleged in the information to be false or misleading, then the drugs in those counts wherein the labeling is so false or misleading in any particular is misbranded in the manner charged by the Government, and your verdict shall be guilty as to those counts wherein such misbranding exists. If you find from the evidence that the statements in the labeling of the drugs covered by the respective counts of the information support the therapeutic claims of the defendants and are true, then the drugs covered by those counts wherein the statements on the labeling as to therapeutic claims are true, are not misbranded, your verdict should be not guilty for all or any of those counts wherein your so find.”

“It is not necessary for the Government to prove that each and all of the statements of each count of the information contained on the label or in the circulars or newspaper mat are false or misleading. If the Government has established by the degree of evidence which I have explained to you, that any one material statement or representation as to the therapeutic effect of the drug upon the label or circular or newspaper mat covered by any one count is false or misleading, then the article covered by that count is misbranded within the meaning of the Federal Food, Drug

and Cosmetic Act, and you should find the defendants guilty as to such counts in which you find the article so misbranded. But if the Government has failed to establish to your satisfaction by that degree of proof and beyond a reasonable doubt any one of the charges of misbranding in any one or more of the counts, then you should acquit the defendants as to such counts."

We respectfully submit that these are absolutely correct statements of the law.

These instructions do not say that the jury shall convict if any statement is false or misleading. They say, "statements * * * that were false, or misleading *in any particular in which they are alleged in the information to be false or misleading*" or "any one material statement or representation *as to the therapeutic effect of the drug upon the label or circular or newspaper mat covered by any one count* is false or misleading", then, etc.

This is a proper statement of the law. See

U. S. v. Doctor David Roberts etc., 104 F. (2d) 785;

U. S. v. Lee, 107 F. (2d) 522;

Goodwin v. U. S., 2 F. (2d) 200.

While the above cases refer to "false and *fraudulent* claims, nevertheless they are clear that under the new act (Section 333a of Title 21 USCA) where no proof of fraud is necessary, all that need be established is that any one claim was false or misleading or to quote the statute "false or misleading in any particular".

Appellants also object to the following instructions given by the Court:

“The Federal Food, Drug and Cosmetic Act does not make the intent with which an unlawful shipment is made, an ingredient in the offense. The intent of the defendants is immaterial.”

* * * * *

“Therefore, if you find from the evidence beyond a reasonable doubt that the drugs involved in the three counts of the indictment, or any of them, were in fact misbranded in the manner alleged in the information or any count thereof, you shall find the defendants guilty as charged in those counts wherein you find the drugs were misbranded, regardless of the intent in the minds of the defendants.”

and objected to the refusal of the Court to give the following instruction:

“To constitute a party guilty of crime, the evidence must show intentional participation in the attempt to violate the statutes in question.”

As we have heretofore shown in this brief, the Federal Food, Drug and Cosmetic Act does not make the intent with which an unlawful shipment is made, an ingredient of the offense. The intent of the appellants is immaterial. See

United States v. 13 crates Frozen Eggs, supra;

Sprague v. United States, supra;

Strong, Cobb v. United States, supra;

United States v. 11¼ Dozen Packages, etc.,
supra;

United States v. 6 Devices, supra;

United States v. Buffalo Pharmacal Co., supra.

Finally appellants object to the refusal of the Court to give the following instruction:

“In this case Mr. Colgrove is jointly charged with the defendant corporation in the information. However, you are instructed that it is the law that an officer of a corporation—and here Mr. Colgrove is President of the corporation—cannot be held liable unless he personally knowingly and actually participates in the commission of the acts alleged to be unlawful. An officer of a corporation is not criminally liable for the acts of the corporation performed by other officers or agents. Therefore, unless you find that Mr. Colgrove did know that the jars of ointment referred to in the Third Count of the information had not been properly labeled, but that the jars of ointment with the incomplete label had been shipped by clerks and employees of the corporation without Mr. Colgrove’s knowledge, then and in that event you will find Mr. Colgrove personally not guilty.”

It must here be remembered that appellants at the outset of the trial stipulated that *defendants* introduced and delivered for introduction into interstate commerce the misbranded drugs in question.

Furthermore, as shown immediately above the knowledge and intent of Mr. Colgrove is immaterial and the proposed instruction was certainly erroneous when it alleges that Mr. Colgrove cannot be held liable unless he personally *knowingly* and actually participated in the commission of the acts alleged to be unlawful and uses other language in the same instruction to the same effect.

CONCLUSION.

A reading of the entire record in this case clearly reveals evidence more than sufficient to warrant a conviction and establishes the guilt of appellants beyond a reasonable doubt as to each count of the information. Furthermore no prejudicial error was committed by the trial Court in connection with either the evidence or the instructions, and the whole appeal consists of the magnification of alleged errors which are of little importance in their setting. This is particularly true of the alleged incidents of unfairness now relied upon by appellants and about which they made no objection in the course of the trial.

By statute (28 USCA Section 391) this Honorable Court is directed to render judgment after examination of the entire record before the trial Court, without regard to technical errors, defects, or exceptions, which do not affect the substantial rights of the accused. This statute has particular force when the evidence of the guilt of appellants is clear and convincing as in this case. This Court is not permitted to reverse a judgment unless errors have been committed which substantially prejudiced appellants.

Coplin v. United States, 88 F. (2d) 652 (CCA-9);

United States v. Waldon, 114 F. (2d) 982 (CCA-7);

Banning v. United States, 130 F. (2d) 330, 339 (CCA-6);

Glasser v. United States, 315 U.S. 60, 63.

We respectfully submit that on the showing made by appellants in this case it would be a miscarriage of justice if this Court were to disturb the verdict and judgment of the forum below.

Dated, San Francisco,
May 26, 1943.

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United States Attorney,

A. J. ZIRPOLI,
Assistant United States Attorney,
Attorneys for Appellee.

No. 10,189

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EMPIRE OIL AND GAS CORPORATION (a corporation), and CHESTER WALKER COLGROVE,
trading as Colusa Products Company,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF.

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FILED

JUN 11 1943

PAUL P. O'BRIEN,



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APPELLANTS' REPLY BRIEF.

INTRODUCTION.

Herein we will reply to appellee's argument concerning the following three points:

- (I) INSUFFICIENCY OF THE EVIDENCE.
- (II) DR. VON HOOVER.
- (III) DUPLICITY.

These three matters take up practically all of appellee's lengthy Reply Brief. The various other important points covered in our Opening Brief have received scant, if any, attention in appellee's brief, and therefore no further argument will be made herein concerning them.

(I) RE INSUFFICIENCY OF EVIDENCE TO SUPPORT
CONVICTION.

(See Appellee's Br., pp. 14-36);

(See Appellants' Br., pp. 6-33).

In our Opening Brief we undertook to show not only that the Government had failed to sustain its burden of proving, by competent *factual* evidence, its allegations as to the lack of efficacy of these Colusa products, but that, on the other hand, the clear-cut and uncontradicted evidence of the defense completely refuted these charges of the Government and demonstrated the efficacy of these products (even though the burden was not upon the defense to so demonstrate).

(a) **Incorrectness of Government's intimation that defense proof was limited to psoriasis.**

The Government, in its reply, intimates that while the evidence may show that these Colusa products are efficacious in the treatment of *psoriasis*, there was no such proof as to these other skin diseases covered by the information. Appellee does not even attempt to show how or why such intimation is justified or correct. It clearly is not. The truth is that the factual evidence of the defense covered *all* the skin diseases named in the information. The evidence of the user witnesses and that of the medical witnesses called by the defense covered *all* of these skin diseases and clearly showed the efficacy of these Colusa products in the treatment of these diseases.

(b) **Government's argument regarding "restoration of skin" is sheer sophistry.**

The second argument resorted to by appellee is that while the evidence may show that appellants' products are efficacious in the treatment of these skin diseases,

still the evidence does not show that these products *will restore the normal skin surface*, and hence this particular allegation of the information has not been refuted. Our answer to this is threefold.

In the first place, the burden was and is upon the Government to prove, *by competent factual evidence* and beyond a reasonable doubt, the truth of this charge. This it failed to do. In short, the burden was not upon the defense to disprove or refute this allegation.

In the second place, while the burden was not upon the defense to disprove this charge, the defense did so. It introduced a large amount of clear-cut factual evidence to show that Colusa Oil actually does conquer these horrible skin diseases, and *does aid in restoring the normal skin surface*. Witness after witness exhibited their arms, hands and other portions of their bodies to show their *now* clean and normal skins, which, but a few months before, had been repulsive masses of scales and sores; skins which had been grievously afflicted with these supposedly incurable diseases; and skins which were completely cleared up in a very short time by this Colusa Oil. What has the Government to say in its brief about this and similar equally cogent and unimpeached evidence? Absolutely nothing!

In the third place, this particular argument of appellee can, with all propriety, be properly classified, we respectfully submit with all due deference, as sheer sophistry. Realizing its inability to answer or explain away the aforementioned clear-cut factual evidence, appellee seizes upon one very insignificant bit of testimony (of Dr. Vincent, a defense witness), and attempts to use it as proof of its contention regarding "restoration of skin surface". We will now undertake briefly to show the utter sophistry and flimsiness of this argument of the Government.

Dr. Vincent (Tr. 96-109), one of the defense witnesses, testified that in the course of his medical practice at Houston, Texas, he had successfully treated hundreds of cases of these skin diseases with these Colusa products. Apparently the Government, in its efforts to find dissatisfied users among these many patients of this kindly and able old physician, had to rest content with one Guidry, a man who admitted that when he first treated with Dr. Vincent his skin disease was so bad and so repulsive he was ashamed to go upon the street. (Tr. 265.) This man suffered from the disease called acne. That disease, even when cured, usually leaves small "pox" or indentations on the portion of the skin which has been affected by the disease. On his cross-examination, Dr. Vincent stated that Colusa Oil did not and could not eliminate these depressions in the skin. (Tr. 260, 261.)

The Government, in its effort to find something to justify its case, seizes upon this bit of testimony of Dr. Vincent and triumphantly proclaims (Appellee's Br., p. 32) that this evidence *conclusively* proves the truth of its claim that Colusa Oil does not restore the normal skin surface. The simple answer to all of this is that *at no time did appellants ever advertise that Colusa Oil would eliminate the indentations caused by acne.* Nowhere in appellants' advertising matter will any such claim be found. Appellee has not and can not point to any such assertion.

As a matter of fact, the sole and *only* reference in appellants' entire advertising matter to "restoration of skin surface" is the very mild and conservative remark that:

"Its detergent and mild antiseptic action inhibits the spreading of skin irritations and *helps* to restore the normal skin surface." (Tr. 24.)

Obviously, no reference of any kind is made in this statement to the indentations caused by acne. Incidentally,

it might also be noted that, as Judge Denman pointed out at the oral argument, the mere fact that the indentations of acne are not eliminated does not mean that the skin surface covering these indentations is not restored. It, of course, is restored just as the skin surface is restored and rebuilt over the "pox" left by smallpox.

Furthermore, as pointed out hereinabove, the uncontradicted factual evidence of the defense clearly and indisputably shows that this Colusa Oil has actually restored the normal skin in various difficult cases of psoriasis and other skin diseases.

Therefore, it is clear, we respectfully submit, that this argument of appellee as to "restoration of skin surface" is sheer sophistry and utterly unsound.

We are dealing, in this case, with some of the most obnoxious and nerve racking and wrecking diseases with which the human body can be afflicted. As to most of these diseases, the medical profession frankly admits it has no cure, or even an effective treatment. Colusa Natural Oil indubitably has brought great relief (not to mention cures) to hundreds and thousands of persons afflicted with these diseases. Yet we find the Government (and its Pure Food and Drug officials), in the face of these undeniable facts, trying to sustain a conviction of the people who have made possible this widespread relief from misery, by resorting to the utterly flimsy claim that appellants should be branded as criminals because their oil did not remove the "pox" from Mr. Guidry's skin!

(c) Re Government's argument as to "germicidal powers".

Appellee's third and last contention is that the conviction can be sustained upon the basis of its charge that appellants represented these products to be *germicidal*. Here again, the entire argument of appellee is, we respectfully submit, plainly unsound and specious.

In the first place, *at no time did appellants represent in their advertising matter, or otherwise, that these products were germicidal.* This charge in the information (like the aforementioned claim of the Government that appellants in effect represented that these products would eliminate the indentations incident to acne) is a bald conclusion of the Government, and not a statement or representations of appellants. Incidentally, this illustrates the vice of this particular information. The Government, if it desired fairly to present clear-cut issues of fact, could have (and should have) picked out and set forth in its information *the exact statements of appellants* which it claimed and asserted to be false. Instead, it set forth various bald conclusions drawn by the Government's attorneys.

This is well illustrated by the phase with which we are now dealing. At the tail end of the quite illegible newspaper mat (Gov. Ex. 8; Tr. 27) is the statement:

"Science papers by eminent physicians state that: 'Radium emanation is accepted as harmoniously in the body as is sunlight by the withering plant.' 'The emanation is taken up in the blood and as quick as lightning, goes to all parts of the body where it kills or checks the disease germs.' " (Tr. 27.)

Now, turning to the information, we find *a portion* of this statement quoted in the information, viz.:

"Radium emanation is accepted as harmoniously in the body as is sunlight by the withering plant."

"The emanation is taken up in the blood and as quick as lightning, goes to all parts of the body where it kills or checks the disease germs." (Tr. 6.)

It should be noted that the introductory portion, viz., "Science papers by eminent physicians state that" was entirely omitted from the information.

The aforementioned excerpt about "radium emanations" is the entire foundation of the Government's argument as to *germicidal* powers. In other words, the Government seizes upon this insignificant excerpt from appellants' advertising matter and attempts to contort it into a representation that appellants' products would kill or check disease germs. In order to do this, it conveniently omits the introductory portion showing that appellants were *merely quoting from medical authorities*. And, surprisingly enough, when appellants sought to prove the truth of this quotation by showing the source of these quotations, that is, the eminent scientists and specialists on the subject of radium who had uttered these pronouncements, the Government strenuously objected (and the court sustained the Government) on the ground that the source or verity of these quotations was immaterial. (See Appellants' Op. Br., pp. 61-62.)

Our first answer, therefore, is that the Government has not even proved the first requisite of its charge, i. e., *that the defendants represented Colusa Natural Oil to be germicidal*.

Likewise, the Government has wholly failed to prove the second indispensable phase of this charge, i. e., that such representation was and is untrue. The only factual evidence introduced by the Government on this phase was the testimony of two bacteriologists who testified that their tests showed that this oil would not kill or inhibit *two* germs, out of millions of germ cultures which exist. (See Appellants' Op. Br., pp. 12-13.) These two germs have nothing whatsoever to do with psoriasis or various others of these skin diseases.

Furthermore, in connection with this "germicidal" phase of the matter, it might also be noted that while there is absolutely no basis for the Government's claim

that appellants represented that Colusa Natural Oil would kill or check disease germs, and while the Government failed to show by competent factual evidence that Colusa Natural Oil is not germicidal, still, even if the defendants had expressly represented in their advertising matter Colusa Natural Oil to be germicidal, the uncontradicted factual evidence in this case would clearly have sustained such representation and shown the truth thereof.

Why is this so? Because the factual evidence in this case clearly shows, without contradiction, that this Colusa Natural Oil *has the power to, and does, check and kill the micro-organisms which cause these skin diseases*. It utterly destroys them. It did so in Mr. Fazio's case, and in the many other cases covered by the defense evidence.

The medical profession seems to be in doubt as to whether it should classify these micro-organisms as *animal* or *vegetable*. As a matter of fact, it knows very little about them. Of course, to the poor afflicted sufferer it makes little difference in which of these categories the pedagogues classify these organisms. These unfortunate sufferers are, of course, interested in checking, and if possible, getting rid of these organisms and their afflictions. And Colusa Natural Oil does this. The record plainly shows this.

The learned author of the Government's brief apparently is under the mistaken impression that a drug is not germicidal unless it will kill those disease germs which can be classified as "animal" disease germs. This, of course, is erroneous and a misconception.

As a reference to any standard dictionary will show, a germicide is *any substance* which destroys micro-organisms, otherwise known as germs. For example, Webster states:

“Germicide—Any substance or agent which destroys micro-organisms.” (Webster’s New International Dictionary.)

What is a germ? A germ is *any* micro-organism, *either animal or vegetable*.

“Germ—(1) A small mass of living substance capable of developing into *an animal or plant* or into an organ or part; an embryo in its early stages; a sprout or bud; a seed.

(2) Biol. The germ cells considered collectively, as distinguished from the somatic cells, or soma.

(3) Hence, in popular usage, any micro-organism, esp. any of the pathogenic bacteria; a microbe; a disease germ.” (Webster’s New International Dictionary.)

“Bacteria—A remarkable group of vegetable micro-organisms of the class Schizomycetes. They are widely distributed, occurring in air, water, and soil, as well as in the bodies of living animals and plants and in products derived from them.” (Webster’s New International Dictionary.)

Therefore, it being clearly shown by the record that Colusa Natural Oil does kill and check the micro-organisms (whether they be classified as animal or vegetable) which cause these obnoxious skin diseases, the entire argument of appellee as to this phase falls to the ground.

Incidentally, before concluding this phase, we desire to advert to certain other statements made in appellee’s brief. At the top of page 18 of its brief, appellee states, with reference to the aforementioned quotation regarding “radium emanations” that:

“This is an extravagant claim without the slightest foundation.”

As shown above, when we sought to show that eminent medical experts, specialists in radium, had made

the very statements in authoritative works, the Government blocked such proof. The Government's own witness, Dr. Kulchar, admitted that this statement regarding radium emanations is at least *partially true*. (Tr. 72.) His theory is that if a radioactive element gets into the bloodstream "it will be taken by the blood and will destroy cells, not germs; it will not kill germs".

Germs, of course, are cellular structures, and it is little short of fatuous for this so-called expert to assert that germs cannot be killed by radium. *It is being used every day for this purpose*. The moment this "expert" conceded that it could and does kill cells, he likewise must admit that it can and does kill germs.

Dr. Frederick Fender, another Government witness, testified that radium *does kill disease germs*:

"I know very little about radium; the trouble with radium is that it kills tissue just as well as it does germs, so it has to be used with a good deal of restraint." (Tr. 76.)

We find, therefore, that even on this wholly immaterial and irrelevant matter injected into this case by the Government, the Government's own evidence is in a hopeless state of confusion.

We respectfully submit, therefore, that appellee has wholly failed to show or establish that the evidence in this cause is sufficient to sustain the conviction herein. To the contrary, the evidence does not at all meet or fulfill, we respectfully submit, the requirements set forth in the authorities cited at page 8 of our Opening Brief.

Incidentally, it should be noted that appellee makes no effort whatsoever to answer or reply to the various authorities cited in our Opening Brief (pp. 27-30) as to the weakness of "opinion" testimony of experts.

In this connection, we desire to refer to the case of *Fulton v. Fed. Trade Commission*, 130 Fed. (2d) 85, which was mentioned by Judge Healy at the oral argument. As we understand that case, it simply stands for the rule that medical experts may voice their opinions as to the therapeutic value of a drug even though they have not used it. In other words, it holds that such evidence is *competent*. Our case involves an entirely different question. Assuming for the sake of argument that the Government's experts were properly permitted to voice their opinions as to the efficacy of Colusa Natural Oil (i. e., that such opinions were *competent*), the question in our case is whether such evidence is sufficient to sustain this conviction when arrayed against it is a mass of clear-cut and uncontradicted *factual* evidence clearly establishing the efficacy of appellants' products.

(II) RE DR. VON HOOVER.

(See Appellee's Brief, pp. 36-65.)

(See Appellants' Op. Br., pp. 33-49.)

We are confident that the Government now fully appreciates the erroneous nature of its objection (and the court's ruling) that Dr. Von Hoover was not qualified to testify as an expert for the defense *because he was not an M. D.* Instead of attempting to uphold the correctness of this objection and this ruling, appellee now seeks to show that even if this ruling was erroneous, still this Court should not reverse, because the error was and is not sufficient to "*shock the conscience of this Honorable Court*".

Our answer to this is that there is no such rule of law as this one contended for by appellee. This "shock the conscience" contention is, we respectfully submit, legally

untenable. The settled law is that if this error of the lower court in rejecting Dr. Von Hoover's testimony was prejudicial (i. e., on an important and material phase of the case), this Court should undo that error by reversing the judgment.

Appellee devotes pages 36 to 65 of its brief to this Dr. Von Hoover matter. All but approximately eight pages are taken up by quotation from the record. (Appellee's Br., pp. 36-57.) At pages 57 to 65, appellee attempts to establish several points with respect to this witness. We will now briefly answer these.

In the first place, the Government seeks to make capital out of the fact that the witness could not recall exactly certain formulae incorporated in one of the pharmacopoeiae. Appellee seeks to show, by various trivial excerpts from the record, that the exclusion of the testimony of this highly trained and competent pharmacologist was proper because he could not offhand recall certain technical formulae. With all due deference, we respectfully submit that such a contention is little short of fatuous. As Judge Stephens pointed out at the oral argument, to expect a doctor or other technical man to keep in his head all of these various chemical and other formulae is about as foolish as to expect a lawyer to keep in mind all the technical legal matters incorporated in his various reference books. As Dr. Von Hoover aptly expressed it during this cross-examination:

"I am not qualified to quote everything from a book, any more than you can quote all the law."
(Tr. 154.)

This pharmacopoeia referred to by Government's counsel contains thousands of formulae and other technical references and statements, and to expect a pharmacologist or other medical men to have these readily in mind

is, we respectfully submit, absurd. Had we undertaken to examine Dr. Tainter (professor of pharmacology called by the Government) in a similar manner, we no doubt would have been chided by counsel and further rebuked by the court for indulging in such a frivolous examination.

Incidentally, it might be noted that Dr. Von Hoover, in replying to counsel's questions as to sulphur ointments, stated that there are *several* such ointments. (See Tr. 152.)

Appellee also seeks to show, as a justification for the exclusion of the testimony of this very important defense witness, that he was not conversant with certain other alleged technical facts. Our answer to all of this is that the witness showed a remarkably complete knowledge of all phases of his science. His long training and extensive experience in his field of the medical and pharmacological science was and is such that he was by far the most competent expert witness produced at this trial. Counsel for appellee seems to be shocked because Dr. Von Hoover classified the mite which causes mange as probably being of vegetable origin. (See Appellee's Br., 58.) He points to this as "an obvious, simple and conclusive indication of his gross incompetence".

In the first place, there is not the slightest attempt by appellee to show why it is incorrect to classify the mange mite as *vegetable*. There is absolutely nothing in the record to show that such a classification is incorrect.

In the second place, Dr. Von Hoover specifically stated that insofar as the mange mite is concerned, scientists do not know just how this should be classified, viz.:

"Q. It is of vegetable origin?

"A. It is probable, but in follicular mange we don't know, because we don't know how the mite ever got on the dog. The Demodex Folliculorum attacks the dog." (Tr. 156.)

If this was such an unfounded statement, why did not the able counsel for the Government *put on rebuttal testimony to refute it?* The answer is that the Government did not and could not refute this statement.

Furthermore, all of this tweedledum and tweedledee about *animal* and *vegetable* is, we respectfully submit, just so much smoke screen and nonsense. Particularly when it is a recognized fact in the biological and bacteriological science that eminent scientists admit that the borderline between these categories is a confusing and indefinite one. Webster also aptly epitomizes this situation:

“Plant—Any member of the group of living organisms exhibiting irritability in response to stimuli, though generally without voluntary motion or true sense of perception; a vegetable in the broad sense, as distinguished from an animal. *Owing to the close relationship between the lower members of the animal and vegetable kingdoms, it is impossible to define plant in terms that will include all plants and exclude all animals.*” (Webster’s New International Dictionary.)

Incidentally, in connection with the foregoing, it might also be noted, in passing, that appellee has nothing to say about its own witness, Dr. Tainter, the pharmacologist, who, after freely voicing opinions as to the lack of efficacy of Colusa Natural Oil in the treatment of psoriasis, expressly disclaimed, on cross-examination, much knowledge about the subject. (Tr. 61.) Likewise, appellee has nothing to say in reply to our comments regarding Dr. Kulchar, who likewise, after glibly voicing opinions as to the lack of efficacy of this oil in psoriasis cases, likewise belatedly confessed on cross-examination: “I do not wish to qualify as an expert on psoriasis.” (Tr. 75.)

And yet, appellee seeks to have appellants branded as criminals on the basis of such so-called evidence!

At the top of page 59 of its brief, appellee quotes from Dr. Von Hoover's testimony concerning fungus. The doctor stated that schizomycetes is a vegetable classification. *And that is exactly what it is.* Yet appellee seeks to make it appear that such testimony indicates the ignorance of his witness. Here again we find *not the slightest effort by appellee to point to any evidence in the record refuting or in any manner impugning this testimony.* The simple truth is that the *schizomycetes* are properly classified as vegetable.

At the bottom of page 59 of appellee's brief, it seeks to distort certain testimony of Dr. Von Hoover into an admission that he does not have a proper knowledge of bacteriology. This particular argument of appellee requires little comment. As the witness testified on direct examination (Tr. 113-115), he has had an extensive training in this science, and he displayed a wide and excellent knowledge of it during his examination in this case. What the witness obviously meant by his aforementioned answer, thus seized upon by appellee, is that *he was not actually practicing the profession of a bacteriologist*, and that such bacteriological work as he does is incident to, and a part of, his professional practice as a pharmacologist. In short, his answer is equivalent to a dentist (thoroughly skilled and trained in radiology) stating that he is not a practicing radiologist, but only uses that science as an incident to his dental practice.

At page 60, appellee seeks to make it appear that the court permitted Dr. Von Hoover to testify at length. The truth is that we could not even *get started* with the important testimony of this witness. Dr. Von Hoover had carefully collected a mass of *factual data* directly bearing on the fundamental issue in this case. This data comprised the *facts and results* actually observed by him in his extensive clinical tests of Colusa Natural Oil in many

cases of the very skin diseases involved in this case. The court, however (due to Government's objection that this man was not an M.D.) *would not even permit him to testify as to these skin diseases*; that is, would not even permit him *to identify a case of psoriasis, leg ulcers, etc.* The excerpt from his testimony as to the *A. Nelly* case is illustrative of this. (See Appellants' Op. Br., p. 41.) How could we have this witness describe the results accomplished in various cases of psoriasis *if the court would not even permit him to testify that these people were suffering from psoriasis?*

The truth is that the Government, by its erroneous objection based on the premise that this man was not an M.D., and the court by its erroneous ruling predicated on the same ground and by its unfair comments, completely destroyed the usefulness of this very vital defense witness.

Appellee must have felt hard pressed, we respectfully submit, for satisfactory material for a reply argument, when it found it necessary to resort to such captious, trivial and specious arguments as those aforementioned. And, in connection with all of these trivialities which appellee resorts to in its effort to justify the exclusion of Dr. Von Hoover's testimony, it should also be noted that the lower court, in making its various erroneous rulings excluding the testimony of this vital defense witness, *did not even have in mind or consider these matters now referred to by appellee.* Nor were they in the mind of the Government counsel when he erroneously objected to this defense witness *on the ground that he was not an M.D.* Why is this true and indisputable? Because these trivial bits of testimony now referred to by appellee occurred long *after* all these erroneous rulings were made. In fact, they occurred at the very end of Dr. Von Hoover's cross-examination (Tr. 154-155), and *after* the last of

these many rulings made by the trial court. The simple truth is that both the court and appellee proceeded and acted, in the court below, solely upon the erroneous premise that this witness could not testify because he was not an M.D.

Appellee seeks to make it appear that one of the principal points in issue with respect to the Dr. Von Hoover phase is the question as to the admissibility of Exhibits L, M and N (the reports). Nothing could be more incorrect. The matter as to these reports was and *is purely incidental and secondary* (though important) when compared to the broader and more important aspects of this Dr. Von Hoover matter, as is shown by our Opening Brief. (See pp. 33-49.)

At pages 38 and 39 of our Opening Brief, we pointed out, incidentally, that we were even prevented from using these detailed memoranda *to refresh the witness' recollection as to many of the detailed facts with respect to these therapeutic tests*. These memoranda were compiled by Dr. Von Hoover at a time when these facts were fresh in his mind, and in this and every other respect they fully qualified as memoranda which properly could be used to refresh the witness' recollection. However, the court even prevented this.

Appellee's final argument with respect to this Dr. Von Hoover phase is that it was a matter of discretion with the trial court as to whether or not it would permit this witness to testify as an expert. At pages 61 to 64 of its brief, appellee cites various authorities to support this argument. Our answer to this is three-fold.

In the first place, the ruling of the trial court that this man was not qualified to testify as an expert because he was not an M.D. is so plainly erroneous and so obviously prejudicial and an abuse of discretion as to require, we respectfully submit, little further comment.

In the second place, the authorities cited by appellee all show that the discretion vested in the court is not an unfettered one but is a limited one. If there ever was an abuse of discretion, it occurred, we respectfully submit, when the trial court in this case prevented this highly skilled and trained pharmacologist from testifying as to these matters so peculiarly within the scope of his science, and so vital to the fundamental issues in this case. And it must be borne in mind that his testimony was not to consist only of "*opinion*" testimony. To the contrary, it was to cover a large mass of *important factual data* bearing directly upon the vital issue as to whether or not Colusa Natural Oil is efficacious in the treatment of psoriasis and these other skin diseases.

Most (if not all) of said authorities cited by appellee involve so-called "*opinion*" evidence *only*, and none of these cases bears any resemblance to ours.

In the *Morton Butler Timber Co.* case (91 Fed. (2d) 884; Appellee's Br. 61), not only was "*opinion*" testimony alone involved, but the trial court actually *admitted* such testimony.

The case of *Clark v. Hot Springs Electric Light & Power Co.* (55 Fed. (2d) 612; Appellee's Br. 61), in stating the various grounds upon which the decision of a trial court as to expert witnesses should be upset by an appellate court, mentions the following: (1) Plain error of law; (2) Serious mistake of fact; (3) Abuse of discretion. The ruling of the trial court that Dr. Von Hoover was not qualified to give either "*opinion*" or "*factual*" evidence herein, because he was not an M.D., falls clearly, we respectfully submit, within both the first and third of said categories aforementioned. Likewise, if any attempt is made to justify this ruling on the ground that the record does not show Dr. Von Hoover to be sufficiently qualified to testify as a pharmacologist, then

such ruling likewise clearly falls within the second category above mentioned, i.e., a serious mistake of fact.

The *Hamilton* case (297 Fed. 422; Appellee's Br. 62), was simply an "opinion" case. The same is true of the *Springs Company* case (99 U. S. 645; Appellee's Br. 62.)

In the *Stillwell* case (130 U. S. 520; Appellee's Br. 62), the trial court prevented a witness from expressing an *opinion* as to the rental value of a mill he had never seen, and about which he knew nothing. Can this be likened at all to the situation involved in our case with respect to Dr. Von Hoover?

The *Inland and Seaboard Coasting Company* case (139 U. S. 551; Appellee's Br. 63), likewise is clearly distinguishable. Certain *opinion* testimony was excluded (i.e., whether or not a certain position near a wharf was a reasonably safe place). The witness had never seen this wharf. The upper court, in refusing to reverse, pointed out that this question as to whether the place was a safe one was a question which the jury could decide for itself, and as to which no special training or experience was necessary. The court concluded, therefore, that as to this point "no opinion of witnesses was admissible".

The *Chateaugay Ore and Iron Company* case (144 U. S. 476; Appellee's Br. 63) likewise involved "opinion" evidence. On the particular facts shown, no abuse of discretion appears.

The last case cited by appellee, *Bradford Glycerine Co. v. Kizer* (113 Fed. 894; Appellee's Br. 63) is likewise an "opinion" case and, on the particular facts involved, there was no showing of error or abuse of discretion.

At the conclusion of its citation of these authorities, appellee makes the statement (p. 65) that the court had the right to require that "the appellants' evidence in the expert field be of equal competence to that adduced by

the Government''. This argument is both legally unsound and factually incorrect. Appellee cites no authorities to sustain this statement and we know of none.

Furthermore, not only was Dr. Von Hoover of *equal competence* with the so-called experts called by the Government, but the record plainly shows that he was and is *much more competent*, insofar as the fundamental issues in this case are concerned, than at least nine of the ten witnesses called by the Government. Not one of these nine was a pharmacologist. The fundamental issue in this case (i.e., the therapeutic efficacy of appellants' drugs) was and is one peculiarly within the very scientific field for which this witness was highly trained and in which he has had so much valuable experience.

As to the other witness, Dr. Tainter, the Government's pharmacologist, Dr. Von Hoover was and is far more qualified and competent to testify concerning the efficacy of Colusa Natural Oil in the treatment of these skin diseases than Dr. Tainter, for the very simple reason, among others, that Dr. Tainter made no tests whatsoever of this oil upon these skin diseases, and hence was not able to give any factual evidence at all as to such treatments.

In the face of these indisputable facts, how can appellee with any hope of success, say that these Government witnesses were more competent as witnesses than Dr. Von Hoover?

Appellee also says that appellants should have called Dr. Von Hoover's clinical assistants instead of Dr. Von Hoover. The fact is, of course, that because of his training and experience in the pharmacological science, this witness was and is far more competent, insofar as the issues involved in this case are concerned, than Major Burby, his veterinarian, or Dr. Beal, the U. S. Public

Health Officer at San Antonio, another of Dr. Von Hoover's clinical assistants. Incidentally, if we had called these other doctors to the witness stand, the Government would probably have objected on the ground that they were not qualified because they were not pharmacologists; or that they were not competent if they couldn't recall the formula for gluside, or recognize a vegetating schizomycetes if they saw one.

(III) RE DUPLICITY.

(See Appellee's Br. pp. 7-13);

(See Appellants' Br. pp. 54-58).

Appellee cites various conspiracy cases to support its answer to the claim of appellants that the third count is duplicitous. They are not in point, we respectfully submit, because it is elementary that in such cases the crime is the conspiracy and hence the fact that several means are used to effectuate its purpose does not make each of those means a separate offense.

Appellee argues, however, that in our case, the offense was the transmission, in interstate commerce, of a misbranded drug, and hence that *the transmission in interstate commerce* of the particular shipment of hemorrhoid ointment involved in the third count was the offense, and therefore the various methods or particulars in which it might have been misbranded do not constitute separate offenses.

We respectfully differ and disagree with this contention. To illustrate our position, we will first assume that a person ships a certain drug by mail in interstate commerce and that he encloses with the shipment an advertising circular which not only misrepresents the therapeutic efficacy of the drug, but also contains various ob-

scene matters. Obviously, under these circumstances, it would not be sound or proper procedure to charge this person in *one count* with misbranding (under the Pure Food and Drug Laws) and sending obscene matter through the mails (under the postal laws). Two counts would necessarily be required to conform to established legal requirements. Not even appellee could or would dispute this. Yet but one and the same shipment is involved in each count, and, under appellee's erroneous theory, this fact would justify the use of but one count.

Now, to take a case a step nearer to our own, let us assume that this same shipper transmits, in interstate commerce, a drug or food which is both misrepresented (i.e., misbranded) and likewise adulterated (let us assume that it is putrid or poisonous). Could these two matters (both of which are punishable under the Pure Food and Drug Laws) be joined in one count? We submit not. Why? Because the proof of either involves *distinct facts and different factual issues*. Under established legal principles (as exemplified by the authorities cited at pages 55-57 of our Opening Brief), if the proof of one phase involves evidence not required for the other phase, two offenses are involved and must be separately pleaded. There are very important practical reasons which justify this requirement. These are pointed out in the various authorities cited in our Opening Brief. And yet, under Appellee's theory (there being only one shipment involved), it would necessarily follow that the two offenses mentioned in the foregoing example could legally be joined in one count. But the law, for very important practical reasons, gives a defendant the right to object to and prevent such a joinder.

So, too, in our case. As shown in our Opening Brief, the two matters joined in the third count are basically different. In fact, the failure to put the weight designation on the jar label is not really *misbranding* at all, in

the true sense. It is simply an act of omission, a negative act wholly distinct and different in kind from the other alleged offense set forth in said count (i.e., an alleged misrepresentation as to the therapeutic efficacy of Colusa Hemorrhoid Ointment).

For the various legal, and the important practical, reasons set forth at pages 57 and 58 of our Opening Brief, it is clear, we respectfully submit, that the joinder of these two matters in one count was bad, and constituted duplicity.

Appellee intimates that appellants' motion to require the Government to elect was tardy and hence the denial thereof was justifiable on this ground. The case of *Guy v. United States* (107 Fed. (2d) 288; Appellee's Br. 13), does not stand for such rule.

The only possible ground for holding such a motion to require an election to be too late would, of course, be that any belated making thereof worked a prejudice to the Government. Such a claim cannot be made under the circumstances of our case. Not only was the Government not prejudiced by the fact that this motion was not made until the conclusion of the taking of the evidence, but such timing *was obviously an advantage to the Government*. Why? Because, with the evidence all in, the Government was then in a position (if required to elect) to select that phase as to which it considered its chances of conviction to be best, and to eliminate the other. Furthermore, it could then turn around and immediately file a new information concerning the phase or phases thus eliminated.

Therefore, there is neither legal nor practical ground for criticising the timeliness of appellants' motion to elect.

CONCLUSION.

Reviewing the record again, and giving consideration to the oral argument, we submit the judgment in the court below has been shown to be erroneous and should be reversed. The suggestion by appellee's counsel that this court can reverse only when the trial court's errors are shown to be such that "shock the conscience" is without substantiation in any case decided by this Circuit or any other Circuit. The Government's argument, in effect, confesses error, but says that until such error is of the magnitude indicated, this judgment should not be reversed. As long as courts of appeal in these United States continue to decide cases on well established legal principles, and reverse judgments where plain and harmful error has been committed, even so long may we expect the present administration of our federal courts to receive the approval of litigants who turn to them with expectancy of justice consistent with such established legal principles. But, if in order to secure a reversal of any case, the admitted errors of the trial court must first be shown to have been of such a nature that they "shock the conscience", then a new rule of law will have been introduced, one which might loosen a flood of evils in appellate procedure which may take a long time to correct.

The insufficiency of the evidence, and the errors committed in re Dr. Von Hoover, in the unfair attitude of the trial court, in the exclusion of the testimonials, and the other errors referred to in our briefs, compel, we respectfully submit, the reversal of this judgment.

Dated, San Francisco,
June 11, 1943.

Respectfully submitted,
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